In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-761

JOSEPH H. DONOHUE,
Appellant,

vs.

CITY OF SAN JOSE, a municipal corporation,
Appellee.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from a judgment by the Honorable James Duvaras, Jr., Judge of the Superior Court of the State of California in and for the County of Santa Clara, entered on January 16, 1974 in Book No. 286 at Page 218, of the court. The issues there and now here are: Is Ordinance No. 15285, as amended by Ordinance No. 15639, of the City of San Jose, Santa Clara County, providing for the imposition and collection of telephone, gas, water and electricity users tax in their enactment and enforcement illegal and unconstitutionally discriminatory as to Defendant Donohue and the penalty attempted to be im-

posed for failure to make timely payment of the tax imposed by those ordinances exorbitant and therefore arbitrary and unreasonable legislation and in violation of substantive due process of law?

STATEMENT OF FACTS

The issues arose out of an action filed by the City of San Jose, Santa Clara County, California, against Joseph H. Donohue as defendant filed February 17, 1972 in the Small Claims Court for the San Jose-Milpitas Judicial District, County of Santa Clara, State of California.

A. Proceedings in the Small Claims Court No. 113005:

By affidavit filed, the City claimed that Defendant Joseph H. Donohue was indebted to Plaintiff City in the sum of $90.85 and that although demand had been made for payment Defendant had refused to pay the same and no part thereof had been paid. Order was issued on that date, February 17, 1972, for the appearance of Defendant in Department 5 of the Municipal Court, in the San Jose-Milpitas Municipal Court Building on March 16, 1972 at 8:45 o'clock in the forenoon and to have with him all books, papers and witnesses to establish his defense to that claim. On March 16, 1972 E. K. Ross representing Plaintiff City was sworn and testified. Defendant Joseph H. Donohue was sworn and testified. As he contested the legality of the City's claim under Section 117 of the Code of Civil Procedure, the Honorable Edward J. Nelson continued the hearing on the claim to 2:25

o'clock on that day and on his own initiative ordered the reporting of the proceedings by an official reporter. As that reporter's transcript of those proceedings was not received in evidence when offered, both at the Pre-Trial Conference and later at the trial in the Superior Court, Defendant's Exhibits "A", "B", "C", and "D" have been requested to be made a part of the Clerk's Transcript in this Appeal. (Clerk's Transcript, pages 5 through 12). The Court took the proceedings under submission. On August 1, 1972 the Honorable Edward N. Nelson made and gave his order transferring the proceedings to the Superior Court. Clerk's Transcript, pages 13 through 14). In that order, Judge Nelson stated, in part: "It is the opinion of this Court that there should be some reasonable proportion to the tax due and the penalty. A $10.00 penalty on 39¢ delinquent tax is far from being a fair penalty."

B. Proceedings in the Superior Court:

After Counsel for the Plaintiff City served and filed At Issue Memorandum and Certificate of Readiness, a Pre-Trial Conference was held on the 29th of May, 1973, and on that day the Honorable Homer B. Thompson made and gave his Pre-Trial Conference Order (Clerk's Transcript, pages 19 through 21, inclusive.) At that Pre-Trial Conference, Defendant offered as a part of those proceedings a photocopy of the Reporter's Transcript of the Small Claims Court proceedings, as a part of his Statement by Defendant of Factual and Legal Contentions To Be Made As to The Issues in Dispute, but such offer was re-

fused by Judge Thompson and the Reporter's Transcript was returned to counsel. After service of Notice of Trial, trial was held on August 30 and 31, 1973 and oral and documentary evidence was introduced and received and the cause was submitted to the Honorable James Duvaras, Jr., Judge presiding in Department 20 of the Superior Court, for the Court's decision. (Reporter's Transcript, page 116-a).

On November 5, 1973 Judge Duvaras, Jr. caused to be served and filed his Memorandum of Intended Decision (Clerk's Transcript, pages 46 through 49, inclusive), and on November 15, 1973 Defendant Joseph H. Donohue served and filed Defendant's Request for Findings of Fact and Conclusions of Law (Clerk's Transcript, page 50). On December 4, 1973 counsel for Plaintiff served proposed Findings of Fact and Conclusions of Law and Judgment on Defendant's counsel. On December 13, 1973 Defendant Joseph H. Donohue served and filed Objections by Defendant to Proposed Findings of Fact, Conclusions of Law and Judgment under Rules of Court, Section 232 (Clerk's Transcript, page 52 and pages 56 through 63). On January 18, 1974 Notice of Entry of Judgment and Declaration of Mailing was served upon Defendant's counsel showing Entry of Judgment on January 16, 1974 (Clerk's Transcript, page 94). Defendant Joseph H. Donohue served and filed Motion of Intention to Move and Motion for a New Trial on January 30, 1974 and, after hearing, a new trial was denied on February 19, 1974.

Appeal was taken to the Court of Appeal of the State of California, First Appellate District, Divi-

sion Two. That Court rendered its decision on August 28, 1975. A copy of that decision is to be found in Appendix II.

Petition for Rehearing was filed on September 10, 1975. Rehearing was denied on September 26, 1975. Petition for Hearing was filed with the Supreme Court of the State of California on October 6, 1975. Hearing was denied by the Supreme Court of the State of California on October 23, 1975.

ARGUMENT

POINT I.

THE CONSTITUTION OF THE UNITED STATES PROHIBITS BOTH THE ENACTMENT AND ATTEMPTED ENFORCEMENT OR ORDINANCE NO. 15285 AS AMENDED BY ORDINANCE NO. 15639 OF THE CITY OF SAN JOSE.

"Though its authors had some self-doubts about the new Constitution, at least one English admirer, Gladstone, praised it as 'the most wonderful work ever struck off at a given time by the brain and purpose of man'" (Professor James E. Leahy, *Social Policy-Making with Liberty and Justice (and Equality) for All,* California State Bar Journal May-June Volume 48 No. 3, page 231).

The Constitution of the United States provides:

"Amendment XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Ratified July 19, 1868)."

Article I of the Constitution of the State of California provides:

"United States Constitution Supreme Law

Sec. 3. The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

The provisions of the Constitution of the United States, Amendment XIV, Section 1, are simple in their wording; they are explicit in their meaning. They cannot be rationalized, disregarded or circumvented. Any legislation, which an ordinance of a city is, whether by its terms or by attempted enforcement under its terms, in conflict with the Constitution must be struck down. (California State Bar Journal May-June Volume 48 No. 3, page 235).

Defendant Joseph H. Donohue as an American citizen and a resident of and a taxpayer in the City of San Jose has no objection to and is willing to pay any and all taxes necessary for the support and necessary operation of the government of the City if those taxes are equally assessed or imposed upon him

equally with all others. If not equally so done, he should and does refuse to submit to them, and opposes them. It was the City of San Jose that chose the forum in which Defendant Donohue was forced to appear and defend against them in the exercise of that opposition.

POINT II.

THOSE ORDINANCES BY THEIR PROVISIONS AND BY THEIR OPERATION IN ATTEMPTED ENFORCEMENT ARE CONSTITUTIONALLY ILLEGAL AND CONSTITUTIONALLY DISCRIMINATORY AS TO DEFENDANT JOSEPH H. DONOHUE.

Ordinance No. 15285, as amended by Ordinance No. 15639, of the City of San Jose, Santa Clara County, in their enactment and attempted enforcement are illegal and constitutionally discriminatory as to Appellant-Defendant Joseph H. Donohue.

In Ordinance No. 15285, Article XVII, Section 17000, it is provided:

"17000. Definitions. Except where the context otherwise requires, the definitions contained in this Section shall govern the construction of this Article:

(a) 'Person' shall mean all natural persons, domestic and foreign corporations, associations, syndicates, joint stock companies, partnerships of every kind, joint ventures, clubs, Massachusetts business or common law trusts and societies."

It is provided in Section 17001 of that ordinance:

"17001. *City, Public Entity and Constitutional Exemptions.* Nothing in this Article shall be con-

strued as imposing a tax upon (1) the City, or (2) any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of the State of California, or (3) the State, any county, municipal corporation, city and county, district or any political subdivision of the State of California."

It is provided in Section 17002 of that ordinance:

"17002. *Telephone Users Tax and Operative Dates.*

(a) There is hereby imposed a tax, at the herein specified rates, upon every person in the City, other than a telephone corporation, using intrastate telephone communication services in the city . . ."

Section 17003 imposes the tax on electricity users, Section 17004 on gas users, and Section 17005 on water users other than a water company.

The full texts of those ordinances are contained in Appendix I, pages i through xxiii, inclusive.

The City of San Jose is in the County of Santa Clara in the State of California. It is 146 square miles in area with a population of 533,900 as of the years of 1973. It is a Chartered City. Ordinance No. 15285 was adopted on July 6, 1970 by a vote of 4 to 2 by its council and became effective August 13, 1970 and was amended by Ordinance No. 15639, effective September 20, 1972. (Appendix I) (supra).

While sections 17000 and 17001 may not seem unreasonable in their provisions as they appear in the

ordinance, it is when those provisions are applied in attempted enforcement that the inequality of the tax imposed becomes manifest and discriminatory against Appellant-Defendant Joseph H. Donohue.

Under that utility users tax ordinance relating to the use of gas and electricity a list of exemptions from the payment of the utility users tax was obtained from the City of San Jose. (Tax-Exempt Open Accounts, Pac. Gas & Electric, Defendant's Exhibit "C"). It consists of 111 pages with about 15 entries on each page. It lists "persons" as defined by Ordinance No. 15285 and is dated April 4, 1972. Defendant Joseph H. Donohue made an analysis of that list and that analysis was introduced and received in evidence as Defendant's Exhibit "D". With respect to the tax on water use, the water company servicing the residents and firms located in the City of San Jose, certain users received water service free of charge. As a result, there were no measurements of the water used and therefore no tax is assessed. (Testimony of Paul J. Schreiber, Reporter's Transcript, page 96 through page 102, inclusive.)

With respect to telephone service to residents and firms located in the City of San Jose, there are telephone users who receive telephone service free of charge or at reduced rates, so that either no utility users tax is assessed or imposed or is assessed or imposed at reduced rates. The amounts or number of such "persons" otherwise subject to the users tax cannot be ascertained. (Testimony of Hugh B. Lee, Reporter's Transcript, pages 80 through 82, inclu-

sive). In Exhibit "D" are listed banks, insurance companies and title companies having places of business in the City of San Jose and otherwise subject to the utility users tax for gas and electricity service that are also exempted by the provisions of the Constitution of the State of California which provides that with respect to the taxes imposed by that Constitution those taxes shall be in lieu of all other taxes (Article XIII, Sec. 16, 1(a), and Sec. 14 4/5 (f)). Whatever the merits or demerits of such provisions otherwise, the practical effect is to purportedly exempt those organizations from the payment of the utility users tax of the City of San Jose on all of the utility services consumed by them in the City of San Jose, and such exemptions, again, work a discrimination against Appellant-Defendant Joseph H. Donohue. The inequities of Ordinance No. 15285, as amended, become not only apparent, but become demonstrated. How or why or for what reasons those inequities have occurred cannot be urged in attempted rationalization or in attempted circumvention in the ordinances themselves or in attempted enforcement of them. Soon after the enactment of those ordinances, Appellant-Defendant Joseph H. Donohue asked for and obtained from the City Officials of the City of San Jose a list of exempt service users and constitutional exemptions. That list was the basis of much of the testimony of witnesses in both the Small Claims Court and the Superior Court. That the City Council knew of the exemptions as set out in section 17001 of Ordinance No. 15285 is evident. Whatever its intentions, it knew that in the enforcement of the

provisions of the ordinances inequities would occur. In the Small Claims Court proceedings, Ferdinand Palla, then City Attorney of the City of San Jose, testified. Both the list and the testimony of Ferdinand Palla, Esquire, disclose the City knew of the exemptions asserted by Appellant-Defendant Joseph H. Donohue to be discriminatory and he asserts that such knowledge and the enactment of those ordinances with that knowledge discloses that he and other utility users not exempted were selected out for discriminatory treatment by subjecting them to taxes not imposed upon other exempted utility users under the ruling of the United States Supreme Court in *Hillsborough Township v. Cromwell* (infra, page 14).

POINT III.

THE PENALTY IMPOSED FOR FAILURE TO MAKE TIMELY PAYMENT OF THE TAX IMPOSED BY ORDINANCE NO. 15285, AS AMENDED BY ORDINANCE NO. 15639, IS EXORBITANT AND THEREFORE IS ARBITRARY AND UNREASONABLE LEGISLATION AND IS IN VIOLATION OF SUBSTANTIVE DUE PROCESS OF LAW.

The penalty imposed for failure to make timely payment of the utility users tax imposed by Ordinance No. 15285, as amended by Ordinance No. 15285 of the City of San Jose is exorbitant and therefore is arbitrary and unreasonable legislation and is in violation of substantive due process of law. Defendant Joseph H. Donohue prepared and introduced in evidence at the trial as Defendant's Exhibit "F" a

Breakdown of the $90.85 Claim. That exhibit is as follows:

Breakdown of $90.85 Claim

Tax Claim $20.85/Penalty Imposed $70.00
Overall Ratio Tax Claim vs. Penalty Imposed 335%

Date of City Demand Letter	Individual Utility Tax Claimed: Gas & Elec.	Telephone	Water	Total Tax Claimed	Penalty Imposed	Percentage Penalty
June 8, 1971	$6.78		$1.63	$ 8.41	$10.00	119%
July 19, 1971			.39	.39	10.00	2,564%
Aug. 24, 1971			1.28	1.28	10.00	781%
Sept. 30, 1971			.46	.46	10.00	2,174%
Oct. 19, 1971		$6.80	.69	7.49	10.00	133%
Nov. 17, 1971		1.66	.60	2.26	10.00	442%
Dec. 16, 1971			.56	.56	10.00	1,785%
TOTALS	$6.78	$8.46	$5.61	$20.85	$70.00	335%

In 3 Witkin, *Summary of California Law,* 7th Edition, pages 1901 and 1902, is found the following:

"IV. Due Process of Law

A. (Sec. 101) Nature and Scope of Guarantee.

(1) *Meaning of Due Process.* The 14th Amendment to the Federal Constitution provides that *no state* shall 'deprive *any* person of life, liberty, or property, without due process of law.' The California Constitution also contains a due process clause. (Art. I, Sec. 13.) And the 5th Amendment states a similar restriction on the *federal government.* In its origin, the meaning of the term 'due process' was *procedural.* The protection was against judicial or administrative procedure which by reason of denial of notice and opportunity for a hearing, unfairly deprived a person of property or personal rights. (See

infra, Sec. 112 et seq.). But in its development in the United States the due process clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus preventing arbitrary and unreasonable legislation. This aspect of the subject is known as *substantive* due process, to distinguish it from *procedural* due process. (See *Davidson v. New Orleans* (1877) 96 U.S. 97, 24 L.Ed. 616; 18 Cal. L. Rev. 583, 1954 A.S. 81: infra, Sec. 102 et seq.; for historical analysis, see *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903; 2 Stanf. L. Rev. 5; 21 So. Cal. L. Rev. 47; 40 Cal. L. Rev. 483; 7 Stanf. L. Rev. 3; 5 UCLA L. Rev. 47; 40 Cal. L. Rev. 47; 40 Harv. L. Rev. 939; Substantive due process is illustrated by cases dealing with the police power (see infra, Sec. 161), but the clause also restricted other governmental powers (see infra, Secs. 102 et seq., 209, and *Taxation,* Secs. 1, 9 et seq.).

(2) *Clause applies to Persons.* The protection of the due process clause is not, like that of privileges and immunities clause, confined to citizens. It extends to *all persons* including corporations. (*Pembina etc. Co. v. Pennsylvania* (1888) 125 U.S. 181, 8 S.Ct. 737, 31 L.Ed. 650.) But a governmental subdivision, such as a county is not a person within the meaning of the clause. (*Riley v. Stack* (1932) 128 C.A. 480, 16 P.2d 110.)" (See, also, a rewrite of the above in 5 Witkin, 8th Edition, pages 3569 through 3571.)

Appellant-Defendant Joseph H. Donohue asserts, in the words of the Honorable Edward J. Nelson in his Order of August 1, 1972 "that there should be

some reasonable proportion to the tax due and the penalty. A $10.00 penalty on 39¢ delinquent tax is far from a fair and just penalty." (Clerk's Transcript, pages 13 and 14.)

POINT IV.

THE CITY OF SAN JOSE ENACTED THE DISCRIMINATORY ORDINANCES AND IT IS ITS DUTY TO CURE THE INEQUITIES OR TO REPEAL THOSE ORDINANCES.

The City of San Jose enacted those discriminatory ordinances and it is its duty to cure the inequities or to repeal those ordinances. It is not the responsibility of the utility user, but it is the responsibility of City enacting the ordinances to see that inequity does not occur or continue to exist.

"In *Hillsborough Township v. Cromwell* (1946) 326 U.S. 620, 66 S. Ct. 445, 448, 90 L.Ed. 358, the governing principle is stated:

'The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.'"

(3 Witkin, *Summary of California Law,* Taxation, 7th Ed. page 2130.)

The Supreme Court of the State of California has recently ruled:

> "We set forth, first, the legal principles of equal protection of the laws that control the instant situation. Municipal corporations are political subdivisions of the state. Subject only to its own laws and constitution, the state may create, expand, diminish, or abolish such subdivisions, and 'all this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.' (*Hunter v. City of Pittsburg* (1907) 207 U.S. 161, 179; see *San Francisco v. Canavan* (1872) 42 Cal. 541, 557-558). Yet this extensive reach of the state to determine whether and how to create, or alter, municipal corporations does not compose an unlimited power (see *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 342-345) since in any instance of state action the Fourteenth Amendment requires that the state afford equal protection of the laws to all persons. On that proposition the Tenth Circuit correctly expresses the rule: 'Certain it is that a state cannot legislate upon even a matter of complete state interest in such manner as to abuse a federal constitutional right.' (*International Harvester Co. v. Kansas City* (1962) 308 F.2d 35, 38; accord, *Adams v. City of Colorado Springs* (D. Colo. (1970) 308 F.Supp. 1397, 1401, affd. (1970) 399 U.S. 901)."
>
> *Curtis v. Board of Supervisors,* 7 C.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972).

In the same decision the Supreme Court ruled:

> " 'On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental rights' . . . the court has adopted an attitude of active

and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' (*Westbrook v. Mihily* (1970) 2 Cal.3rd 765, 784-785, vacated on other grounds (1971) 403 U.S. 922.)"

Curtis v. Board of Supervisors, supra.

Appellant-Defendant Joseph H. Donohue asserts that the City of San Jose in its enactment and in its attempted enforcement of the utility users tax ordinances has not met by evidence in these proceedings the burden of establishing a compelling interest that justifies the law or that the constitutional discriminations in the ordinances themselves and in their attempted enforcement are necessary to further their purpose, as will be more particularly discussed in Point V. hereinafter. Expediency cannot and must not justify unconstitutional discrimination.

POINT V.

THE FINDINGS OF FACT ARE NOT SUPPORTED BY THE EVIDENCE, THE CONCLUSIONS OF LAW AND JUDGMENT ARE AGAINST THE LAW: THE COURT ERRED IN REFUSING PROFFERED EVIDENCE.

The Findings of Fact are not supported by the evidence and the Conclusions of Law and Judgment are against the law. Rather than trying to paraphrase the statement by certification of Defendant Joseph H.

Donohue in Objections by Defendant to Proposed Findings of Fact, Conclusions of Law and Judgment under Rules of Court, Section 232 (Clerk's Transcript, pages 51 and 52 and pages 56 through 63 inclusive), which his counsel believes to be quite comprehensively and excellently done, it is set out in full in this brief, as follows:

"Certification of Objections by Joseph H. Donohue, Under Penalty of Perjury, To Proposed Findings of Fact, Conclusions of Law.

"State of California
County of Santa Clara—ss:

"I, Joseph H. Donohue, Defendant in the Superior Court of the State of California, in and for the County of Santa Clara, Case No. 277500, entitled City of San Jose, a muncipal corporation, versus, Joseph H. Donohue, do hereby state, under penalty of perjury, as follows:

"1. I was present at all the Court proceedings and heard the testimony stated below and know of my own knowledge that the evidence referred to below was introduced and accepted.

"2. Further, to the best of my knowledge, belief, and recollection of facts the statement below is true.

"3. I consider the Finding of Fact and Conclusions of Law (hereinafter referred to as the Findings) which was mailed to my attorney (William Prather) on December 4, 1973, to be inconsistent with the evidence and testimony presented during the proceedings. Further, I consider the Findings to be a grave injustice.

"4. The Findings rule that discrimination is not a violation of law. Finding IX rules that the

government can discriminate if it is claimed an administrative expense is required to achieve equality. Finding IX also rules that the legality of discrimination can be based on a percentage factor. Finding IX is largely based on the unfounded premise that the administrative expense required to set up a separate accounting system to collect the right amount of tax, from all public utility employees, that presently only pay part of the tax or no tax at all, would exceed the tax collected. I challenge this premise due to the fact that the tax is presently collected by the various public utilities which employ electronic accounting and billing processes. The tax is automatically added to the consumers bill and paid to the utility company by the consumer. The programs used in the existing billing process would only require minor reprogramming to include the factors to develop the required tax when discounted or wholly free utility is provided. The statement in Finding IX, '. . . existing billing system would entail such extensive administrative expense that it would drastically reduce net revenues or cause higher rates to get the same net revenues,' cannot be substantiated and using it as a basis to excuse discrimination is unacceptable. It is also emphasized that the Court instructed the attorneys at the conclusion of the trial, to include in their final argument an authority which ruled that if utilities provided to an employee have a value, is that value subject to taxation. When the Court makes such instructions, this must be considered relevant. The Findings do not mention the relevance of this point even though the Argument of Defendant Joseph H. Donohue on Submission of Cause cited the case of *Gordon S. Dole,* 43 T.C.

697 (1965) Affirmed 351 F.2d 308, (C.A. 1st, 1965). The ruling of that case was that benefits, including utilities received by an employee, do have a value which is taxable. Evidence in these proceedings substantiate that San Jose residents employed by public utility companies receive some utilities free and others received some at reduced rates and no tax is paid on the free utilities or discounted portion.

"5. Finding XI rules that the tax is fairly and equally administered. This ruling is not consistent with the evidence presented at these proceedings. Defendant's Exhibit D (titled Summary of Exemptions, Tax Exempt Open Accounts, 13 pages) included the following:

a. P.G.&E. Rod and Gun Club Account #GVP6011111

b. Spartan Shops Inc., DBA Satellite Snack Bar, Account #KVP8112102

c. Spartan Shops Inc., c/o Florence De Malta, Account #KVP8910701

d. Sgt. Pierce, 5715 Almaden, #1, Account #NVP1260028

e. Sgt. Robledo, 5686 Tucson, #4, Account #NVP1270445

f. Sgt. Mayida, 5707 Almaden, #1, Account NVP#1260114

g. Walter Caples, 1510 Walnut Grove Avenue, Account #BVP7711206

h. San Jose Water Works (Telemetry Equipment), Account KVP#8219031

i. Great Oaks Water Company (Office) Account #PVP3242731

j. San Jose Water Works (Office) Account #XVP4428001

"The City has arbitrarily exempted the above listed accounts (a through j) even though no legal basis exists for them to be exempted. It must be noted that while the ordinance exempts electricity used by water companies to pump water, it does not exempt electricity used for the purposes listed in h through j, above. No valid reason for exempting those accounts a through g above, was presented at the proceedings. In view of the above, it is evident that the tax is not fairly and equally administered.

"6. Finding XIII rules that nonexempt lessees of banks and insurance company properties can consume utilities on which no tax is paid. This finding is based on the stated claim that separate meter service for nonexempt and exempt consumers is impractical. The Defendant submits that two separate meters in a building is not only practical, but in fact largely employed in practically all duplex dwellings. Additionally, many large multi-occupied buildings have individual metered service to each occupant. The Defendant further submits that the Plaintiff has systematically created discrimination by not exercising its legal authority to adopt an ordinance to require the separate metered service. Finding XIII further states that the additional income to install separate meter service, for exempt and nonexempt consumers, would not be worth the additional expense. The Defendant submits that this claim is unfounded as the City would not incur any expense if separate metered service was installed in the bank and insurance company buildings. The expense of such installation would

be either at the expense of the utility company or the consumer. The Defendant wishes to point out that the evidence presented at these proceedings substantiated that banks which are constitutionally exempt from paying the tax do, in fact, pay for utilities consumed by tenants that are not exempt, and these tenants consume utilities on which no tax is paid. This was testified to by the Plaintiff's own witness when the Court itself asked the question. The witness even identified certain bank buildings.

"7. Finding XV rules that nonexempt lessees of City properties can consume utilities on which no tax is paid. This Finding is based on the fact that utilities consumed by these nonexempt consumers are made part of a lease. It is noted that the Findings state the cost of the utilities are considered in the lease. However, no consideration for the tax on these utilities is made as part of the lease. Defendant's Exhibit D (Summary of Tax Exempt Open Accounts) itemized 17 separate P.G.&E. account numbers covering numerous buildings at the San Jose airport. Some of these buildings are wholly used by nonexempt consumers and no tax is paid on the utility use consumed. A Plaintiff's witness testified that one of the accounts listed in Defendant's Exhibit D was Lockheed's Hangar, a nonexempt consumer. His testimony included reference to other nonexempt tenants that consumed utilities on which no tax is paid. The Defendant submits that the Plaintiff is arbitrarily and systematically contributing to the discrimination against the Defendant by providing nonexempt consumers with utilities on which no tax has been paid through their leasing procedure. The Defendant further submits that

this discriminatory practice has been employed from the time of the utility tax ordinance enactment up to and including the trial date.

"8. Finding XVIII rules that the penalty imposed is reasonable. Defendant's Exhibit H (Breakdown of $90.85 claim) clearly shows a systematic procedure that maximizes the penalty. The percentage of penalties imposed resulted in the percentage of penalty to tax due ratio of 2564 percent, 2174 percent and 1785 percent in three of the seven tax claims. The Defendant submits that this penalty is exorbitant and is therefore arbitrary and unreasonable legislation. Additionally, the Order by Judge Nelson of the Small Claims Court which brought this action to the Superior Court stated, 'It is the opinion of this Court that there should be some reasonable proportion to the tax due and the penalty. A $10.00 penalty on 39 cents delinquent tax is far from being a fair and just penalty.'

"Testimony at the trial of these facts revealed that, while the ordinance permits a penalty in excess of 2500 percent to be levied on a consumer for nonpayment, it limits the penalty that can be imposed on a supplier to 25 percent, even when fraud is committed. The Defendant submits that the Court failed to recognize this inequity whereby individuals and private enterprise are excessively penalized for infractions and public utilities only have to make minor token payments, even where felonies are involved.

"9. The Findings have completely ignored the basic point of issue, that being to define the class. The Defendant submits that there can only be one class on which a utility 'users' tax can be

equally applied, and that is the actual consumer. The Findings bases its ruling on the point that who consumes (uses) the utility is irrelevant and finds the class to be who pays for the utility consumed. This rationale is what forces some nonexempt consumers to either directly or indirectly pay the tax and allows other nonexempt consumers to consume utilities on which no tax is paid. The Defendant submits that this finding discriminates against him.

"10. The Findings appear to be based on several citations.

a. *Lindsley vs. Natural Gas Company* (1911) 220 US 61, 78, ruling which was cited in the Court's Memorandum of Intended Decision.

b. *Rivera vs. City of Fresno* (1971) 6 Cal 3d 132, which was also cited in the Court's Memorandum of Intended Decision.

"The Defendant interprets the *Lindsley vs. Natural Gas Company* ruling as saying a reasonable basis must exist. In the issue at hand, and as stated in the preceding portions of this statement, the utility tax does not have a reasonable basis. As shown above, the basis of the tax is not equally and reasonably collected, due to the Plaintiff City's systematic, arbitrary, and discretionary application of the tax and its failure to exercise its authorized power to enact ordinances and to include in its leasing agreements with nonexempt tenants the value of the tax that should be paid by those nonexempt tenants. The Defendant further submits that this case was not contested on some mathematical nicety, but emphasizes that the

Plaintiff City used a mathematical nicety in the application of the tax, i.e., five percent of the amount of the utility when the utility is paid by a nonexempt consumer, while permitting the numerous nonexempt consumers to escape paying the tax when the utilities they consume are paid for through an exempt entity. This is discrimination against the Defendant. Amendment XIV of the Constitution of the United States is plain when it says, 'Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.'

"The *Rivera vs. City of Fresno* case is considered to be insignificant in this issue, as the issue in the *Rivera* case is associated with the power of the City to enact a utility users tax ordinance when the State has preempted the collection of Sales and Use taxes. The Defendant did not challenge this ruling in any manner and it was not a point of issue in this case (277500). The Defendant views the citation of the *Rivera* case in this issue as nothing more than a smoke screen to add credibility in excusing the Plaintiff City's discrimination against and oppression of the Defendant and other nonprivileged/nonexempt consumers.

"11. The Finding completely ignores the governing principle of discrimination in taxation. This governing principle was cited in numerous Defendant's filings, including the 'Statement of Defendant of Factual and Legal Contentions to be Made as to The Issues in Dispute,' and 'Argument of Defendant Joseph H. Donohue on Submission of Cause.' This U.S. Supreme Court citation is *Hillsborough Township vs. Cromwell* (1946) 326 U.S. 620, 66 S.Ct. 445, 906 L.Ed. 358. This governing principle rules in essence that there is unequal protection when discrimination is a result of Plaintiff City itself not removing the causes of discrimination. As shown above, the City has not exercised its authorized power and administrative prerogatives to remove the causes of discrimination. The Defendant submits that the utility tax imposed by the Plaintiff City is discriminatory as to him, and does in fact deny the Defendant equal protection of the laws; and will continue to deny him his equal rights or protection until such time as the Plaintiff City removes the causes of discrimination.

"12. In conclusion, the Defendant submits that the Findings excuses discrimination on false claims, assumptions and citation of inappropriate rulings.

"I certify under penalty of perjury that the foregoing is true and correct.

"Executed at ....., California on the ..... day of December, 1973.

.....

James H. Donohue"

The Court erred in refusing proffered evidence. Defendant Joseph H. Donohue at the Pre-Trial Conference in the Superior Court on May 28th, 1973 offered the reporter's transcript of the proceedings in the Small Claims Court No. 113005 as Exhibit "A" of the Statement of Factual and Legal Contentions to be Made as to the Issues in Dispute (Clerk's Transcript, page 15 through 18, inclusive) but said offer was refused and

the transcript was returned to counsel. That reporter's transcript of the Small Claims Court proceedings was again offered at the trial in the Superior Court on August 30 and 31, 1973, and was again refused. (Reporter's Transcript, page 105.)*

Appellant-Defendant Joseph H. Donohue asserts that the reporter's transcript of the Small Claims Court proceedings was pertinent and material to the evidence in the Superior Court and that each Superior Court Judge erred in refusing that reporter's transcript as a part of the evidence by Defendant Joseph H. Donohue in the Superior Court. In Witkin, *California Evidence,* Second Edition, page 568, is the following:

> "The Hearsay Rule
>
> 13. Former Testimony
>
> (b) Former Proceeding.
>
> (1) (Sec. 598) Prior Civil or Criminal proceeding. The first class of proceedings listed in Ev.C. 1290 includes '*Another* action' or 'former hearing or trial of the *same action.*' (Ev.C. 1290(a).) This makes admissible former taken in the following in the following proceedings:
>
> (a) *Prior Trial of Civil Action.* (See, e.g., *Gates v. Pendleton* (1925) 71 C.A. 752, 758, 236 P. 365)"

*A photocopy of that reporter's transcript is contained in Appendix I, Appellant's Opening Brief, page 2 through page 76.

POINT VI.

THE IMPORTANCE OF THE ISSUES RAISED IN THESE PROCEEDINGS CANNOT BE GAINSAID

Although these proceedings originated with the filing by the City of San Jose of an action in the Small Claims Court for failure to pay such small amounts of $20.85 in taxes and $70.00 in penalty, the issues raised by Defendant Joseph H. Donohue are awesome as they go to the fundamental principles of governmental society and the principles upon which the American Government was created and upon which it was founded, Equal Protection of the Law and Due Process of Law.

The search for legal support in his defense has taken Appellant-Defendant's counsel, beginning with the Holy Bible, through the Magna Carta, the Mayflower Pact, the Declaration of Rights of 1765, the Declaration of Rights of 1774, the Declaration of Independence of July 4, 1776, the Constitution of the United States and its Amendments, the California Constitution, case law as cited in Defendant's Statement by Defendant of Factual and Legal Contentions to be Made as to the Issues in Dispute, on file in these proceedings (Clerk's Transcript, pages 15 through 18) and, in addition, the following:

Emory D. Martindale, *American Concepts and Standards,* (Los Angeles, Wm. B. Staub Printing Co.) pp. 17, 18;

Thomas M. Cooley, LL.D. *The General Principles of Constitutional Law in the United States of America* (Boston, Little, Brown and Company, 1898) pp. 1-9;

Irving Dillard, *The Spirit of Liberty, Papers and Addresses of Learned Hand,* (New York, Alfred A. Knopf, 1952);

Constitution of the United States, Constitution of The State of California (California State Senate 1969-1970);

Charter of the City of San Jose, in Effect May 4, 1965 (City of San Jose, California 1965) and

Journal of the State Bar of California (The State Bar of California May-June 1973 Vol. 48, No. 3).

To even attempt to summarize what is believed to be pertinent to Appellant-Defendant's contest to Utility Users Tax of the City of San Jose, both with respect to its enactment and its attempted enforcement would require such an extensive written brief, that counsel questions his ability and talent to prepare it.

But Appellant-Defendant most earnestly asserts that while the power of the state to tax is basic to its sovereignty, *it is not without limits;* that the county is a subdivision of the state and a city, also a division of the state, exists under a charter, such as the City of San Jose, approved and consented to by the Legislature of the State. In *Curtis v. Board of Supervisors* (1972) 7 C.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537, the Supreme Court of the State of California ruled, in part:

"We set forth, first, the legal principles of equal protection of the laws that control the instant situation. Municipal corporations are political subdivisions of the state. Subject only to its own laws and constitution, the state may create, expand, diminish, or abolish such subdivisions, and 'all this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.' *(Hunter v. City of Pittsburg* (1907) 207 U.S. 161, 179; see *San Francisco v. Canavan* (1872) 42 Cal. 541, 557-558.) Yet this extensive reach of the state to determine whether and how to create, or alter, municipal corporations does not compose an unlimited power (see *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 342-345) since in any instance of state action the Fourteenth Amendment requires that the state afford the equal protection of the laws to all persons. . . . On that proposition the Tenth Circuit correctly expresses the rule: 'Certain it is that a state cannot legislate upon even a state matter of complete state interest in such manner as to abuse a federal constitutional right.' *(International Harvester Co. v. Kansas City* (1962) 308 F.2d 35, 38; accord, *Adams v. City of Colorado Springs* (D. Colo. 1970) 308 F. Supp. 1397, 1401, aff'd. 399 U.S. 901.)"

"'On the other hand in cases involving "suspect classifications" or touching on "fundamental interests" . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but

that the distinctions drawn by the law are necessary to further its purpose.' *(Westbrook v. Mihaly* (1970) 2 Cal. 3rd 765, 784-785, vacated on other grounds (1971) 403 U.S. 922."

Curtis v. Board of Supervisors, supra.

Nor can a taxpayer be subjected to intentional discrimination that would be a violation of equal protection of the Constitution *(Hillsborough Township v. Cromwell* (1946) 326 U.S. 620, 66 S.Ct. 445, 906 L.Ed 358, supra), and a state cannot deny substantive due process in exercising its power to tax *(Myles Salt Co. v. Board of Com* (1916) 239 U.S. 457, 36 S.Ct. 204, 60 L.Ed 392). Equality and Uniformity in imposition of burden of taxation is the Constitutional goal *(Hawks v. State Board of Equalization* (1964) 229 Cal.App.2d 427, 40 Cal.Rptr. 478). The Constitutional provision requiring uniformity of taxation means uniformity in operation, not result *(Stadler v. State Board of Equalization* (1964) 227 Cal.App.2d 314, 38 Cal.Rptr. 605). The governing principle is stated in *Hillsborough Township v. Cromwell* (1946) 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed 358, (supra). The interpretation must be presumed from the enactments of those ordinances.

Appellant-Defendant Joseph H. Donohue asserts the doctrine of Exhaustion of Administrative Remedies has no application to these proceedings, primarily because he is and has always been a defendant in these proceedings. For counsel to suggest that that doctrine applies and that Defendant must seek claimed redress from the Public Utilities Commission

of the State of California not only demonstrates the inequity of the tax imposed by the City of San Jose but would leave the inequity of the exemptions of banks, insurers, bail bond brokers and enumerable other utility users permitted to be exempted from the Utility Users Tax residing or having a place of business within the limits of the City of San Jose. It is the responsibility of the City itself to see that no inequity exists in the taxing ordinances, either in the provisions of the taxing ordinances themselves or in the operation of enforcement. If that cannot be done, the City must repeal those ordinances. *(Hillsoorough Township,* (supra).

It is recalled his Honor James Duvaras, Jr., wished, if possible, counsel to furnish authority on the question that despite the fact the utility users exempted under the Utility Users Tax have, in fact, received value which is a value that is taxable by law. The only authority found, and that authority by analogy, is found in 2 Merten, *Law of Income Taxation,* Chapter 11, page 77, paragraph 11.16 where the fair value of a house and accommodations were received by an employee in lieu of a higher cash salary and was deducted by his employer constituted income to the extent of the fair rental value of such accommodations, the fair rental value, including the cost of utilities, was found to be taxable. *Gordon S. Dole,* 43 T.C. 697 (1965) Affirmed 351 F.2d 308; (C.A. 1st 1965). By analogy, the fair value of water, gas, electricity and telephone received either free of charge or a reduced rate would and should be taxable.

Surmounting all else are the doctrines of "Equality" and "Justice" that have been given to us by God and His gift of our right to govern ourselves. Those doctrines are of the very essence of government itself. As written by Emory D. Martindale, in *American Concepts and Standards,* (supra):

> "Sovereignty originates in the great heart of God. He is the Alpha (beginning) and Omega (end) of *sovereign* power. He is above all and over all, and to Him every knee shall bow. And in order that society may attain its highest concepts and standards, God has delegated to man limited sovereign power, and to enable man to exercise this power in concert with others of his own order, society has been organized into states. Man has assumed the role of legislator, executive, judge and jury. *The rule of man has not been altogether pleasing to God,* but with all the divine attributes of a Supreme Being, God has, in tenderness and mercy, tempered man's exercise of sovereignty with justice and equity. Founded upon the sovereign will of God, and as a result of exercise of sovereign power by man, society has made great progress and a national spirit has been stimulated.
>
> "*A government functioning is sovereignty in action.* The people in whom sovereign power is vested constitute the nation. The life and well being of a nation depend in no small degree upon how that nation exercises sovereign power. Peace and war, prosperity and poverty, happiness and misery, depend upon the exercise of this power. International relations may be made secure or disrupted by its exercise and its exercise is governed by the habits customs and laws of the people. Radical changes in the exercise of this power is dangerous, and may produce destructive effects."
>
> (Emory D. Martindale, *American Concepts and Standards,* (supra).

In Cruden's Concordance to the Holy Scriptures are found in excess of 30 references to the words, "Equal," "Equality," "Equaleth," "Equally," "Equals," and "Equity." (Alexander Cruden, M.A., *A Complete Concordence to the Holy Scriptures of the Old and New Testaments,* Fleming H. Revell Company, supra).

And now in our own time, and in recent months, is the article by Professor James E. Leahy entitled: *Social Policy-Making With Liberty and Justice (and Equality) for All,* in the Journal of the State Bar of California, May-June 1973, Volume 48, No. 3, excerpts from that article are as follows:

> "Fair, Right, Just
>
> "Not only did the Bill of Rights specifically identify certain rights and minimum standards of justice, the Fifth and later the Fourteenth Amendments guarantee that no person 'shall be deprived of life, liberty, or property without due process of law.' 'Due process of law,' Justice Frankfurter wrote, 'is that which comports with the deepest notions of what is fair and right and just.'
>
> "Despite the general agreement (I assume) that our country is committed to freedom, and justice and equality, we have too often given lip-

service to these ideals and then totally ignored them in the decision-making process."

Professor James E. Leahy, Social Policy-making "With Liberty and Justice (and Equality) for All", Journal of the State Bar of California, May-June 1973, Volume 48, No. 3, page 229.

"The instances in which the government has denied justice and equality, and infringed upon liberty are many—and the Supreme Court of the United States is no exception.

"We need a revolution in this country—an educational revolution—in which there will be a reawakening of all our people to the commitment our forefathers made when they created *this* constitutional government. We need a national reaffirmance that there *will be liberty,* and justice, and equality in this land of ours."

(Ibid. page 230).

"All branches of the government ought to be in the forefront of this revolution. But what Justice Friedman wrote about legislatures is equally true of the executive branches of our government, particularly as to their performance with regard to the preservation of these great values. Justice Friedman stated:

> A dispassionate observer of legislative (and executive) performance can feel only dismay and foreboding."

(Ibid. page 230).

"Elsewhere I have written:
When a legislative body is considering a new law, should it not ask to what extent the proposed legislation comports with justice or furthers the cause of liberty? When any member of an execu-

tive branch, federal or state, contemplates action against a citizen, should not that action be measured against the values of freedom and justice?

"The answer must be a resounding yes, if we are to even come close to making our practices consistent with our ideals."

(Ibid. page 230).

"Justice Jackson put it this way: The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as *legal principles to be applied by the courts.* One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

(Ibid. page 232).

"The real issue in the role of the courts in our system therefore is not whether courts *should* make social policy, but whether the policy which they make is in accordance with our ideals of liberty, justice and equality."

(Ibid. page 232).

In the American Bar Association Journal for December 1972, Volume 58 pages 1249-1350, is an article written by William G. Halby entitled: *"Is the Income Tax Unconstitutionally Discriminatory?"* The following are excerpts from that article:

> "The present Internal Revenue Code is so discriminatory as to violate the uniformity principles of the Constitution. Taxpayers with the same amount of income pay different amounts of taxes

depending on whether they are wage earners, investors, home owners, tenants or some other type of income recipient. Perhaps it is time to return to the basic constitutional principles of the early income tax law cases."

William G. Halby, *Is The Income Tax Unconstitutionally Discriminatory?* (American Bar Association Journal, December 1972, Volume 58, page 1291).

"Most people dislike paying taxes, but what they really resent is being forced to pay more than their fair share. It violates our sense of justice, the essence of which is that tax laws should adhere, as far as possible, to the principle of equality, or uniformity, as opposed to preference and discrimination. That principle requires that income arising from different economic sources or activities be taxed alike and that persons having equal incomes should pay equal amounts of taxes."

(Ibid. page 1291).

"In the face of this 'conspiracy' of the tax establishment, therefore, it is little short of amazing to find a court reaching the decision the Supreme Court of Pennsylvania did in *Tilghman v. Kane,* 279 A.2d 53 (1971), a state decision that seems likely to have far-reaching federal repercussions. In the *Tilghman* case the court held that a state income tax that followed the definition of 'taxable income' in the federal Internal Revenue Code was invalid under the uniformity clause of the Pennsylvania Constitution, which provides that 'all taxes shall be uniform, upon the same class of subjects' within the state."

(Ibid. page 1291).

"In *Tilghman* the Pennsylvania Supreme Court found that the state, by adopting federal taxable income as its standard, created thereby such widespread tax preferences among taxpayers with similar amounts of income that 'unequal burdens are being imposed . . . in violation of the uniformity clause. These pervasive and impermissible discriminations between similarly situated taxpayers render . . . (the act) invalid.' In a 1932 decision, *Pennsylvania v. Girard Life Insurance Company,* 158 A.2d 262, the Pennsylvania court had said that the Pennsylvania uniformity clause was parallel in meaning, as applied to tax matters with the equal protection and due process clauses of the Federal Constitution and that what 'would violate one would generally contravene the other.'"

(Ibid. page 1292).

"The decision opens up the possibility of judicial relief from the discriminatory federal tax legislation through the application of constitutional restraints. To tax reformers, frustrated in their efforts to achieve genuine tax reform through Congressional legislation, it offers a fresh approach to the problem through the courts. It suggests the possibility that judges, conditioned in recent years to respond sympathetically to claims of discrimination in other areas (for example, civil rights) may now be receptive to the same appeals in the tax area.

"In view of the deaf ear turned by Congress and the executive branch, litigation appears to be the only avenue to tax reform left, short of revolution. (But it must be remembered that the American Revolution was fought, in part, over

the issue of taxation.) Our form of government clearly contemplates that the courts, through the power of judicial review, are to act as a check on the abuses of the other branches of government. That is the essence of our unique system of checks and balances. It is time for the courts to abandon the doctrine of judicial abstention of matters of economic process and to recognize once again their constitutional responsibilities, acknowledging the fact that economic rights are just as important and as deserving of protection as any other kind of civil rights."

(Ibid. page 1292).

"The Supreme Court, even while upholding the constitutionality of tax legislation before it, has repeatedly recognized that cases may arise of taxes so arbitrary and discriminatory as to amount to an unlawful taking of property without due process. Hamilton himself, as quoted by Justice Field in the *Pollack* case, (*Pollack v. Farmer's Loan and Trust Company,* 157 U.S. 429), said, 'the genius of liberty reprobates everything arbitrary or discretionary in taxation', and *Cooley on Taxation* adds that 'favoritism could make no pretense to equality; it would lack the semblance of ligitimate tax legislation."

(Ibid. page 1292).

"The prospect of a tax so inherently discriminatory in favor of wealth alarmed the dissenters in *Pollack* who spoke eloquently in favor of the principle of equality. Justice Harlan said:

> Thoughtful conservative men have uniformly held that the government could not be safely administered except upon principles of right, justice and equality—without discrimination

> against any part of the people because of their . . . having or not having incomes from bonds and stocks.

Justice Jackson declared:

> . . . (The present decision) substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens . . . such as the framers of the Constitution never could have contemplated, such as no free and enlightened people can ever possibly sanction or approve.

And Justice White wrote:

> . . . (The conclusion of the majority) takes invested wealth and reads it into the Constitution as a favored and protected class of property, which cannot be taxed without apportionment, whilst it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, the mechanic, and all other forms of industry upon which the prosperity of a people must depend, subject to taxation without that condition. A rule which works . . . this result . . . stultifies the Constitution by making it an instrument of the most grievous wrong."
>
> (Ibid. page 1293).

An analogy of the foregoing writings to the issues raised and presented in these proceedings may easily be drawn. The full text of the article by William G. Halby may be found in Appendix VI, page 121 through page 123, inclusive.

CONCLUSION

In conclusion, Appellant-Defendant Joseph H. Donohue urges this Court to reverse the Judgment of the Superior Court of the County of Santa Clara on the grounds that Ordinance No. 15285, as amended by Ordinance No. 15639, is illegal and constitutionally discriminatory as to Appellant-Defendant in its enactment and attempted enforcement and the penalty attempted to be imposed for failure to make timely payments of the tax imposed by those ordinances is exhorbitant and therefore arbitrary and unreasonable legislation and in violation of substantive due process of law;

That the City of San Jose be ordered to cure each and every exemption from the payment of that tax, and, in the event that that cannot be expediently so done, that the City of San Jose immediately thereupon repeal those ordinances; if not, this Court strike down those ordinances; and

Appellant-Defendant be granted such other and further relief as may be appropriate and just.

Dated, San Jose, California,
November 18, 1975

Respectfully submitted,
JOSEPH H. DONOHUE,
Appellant in Propria Persona.

(Appendices Follow)

APPENDICES

Appendix I

ORDINANCE NO. 15285 AS AMENDED BY ORDINANCE NO. 15639

ORDINANCE NO. 15285

ORDINANCE OF THE CITY OF SAN JOSE AMENDING THE SAN JOSE MUNICIPAL CODE BY ENACTING, ADOPTING AND ADDING THERETO A NEW ARTICLE, WHICH SHALL BE NUMBERED ARTICLE XVII, PROVIDING FOR THE IMPOSITION AND COLLECTION OF TELEPHONE, GAS, WATER AND ELECTRICITY USERS TAX.

Be It Ordained by the Council of the City of San Jose:

The San Jose Municipal Code is hereby amended by enacting, adopting and adding thereto a new Article, said new Article to be numbered and to read as follows:

ARTICLE XVII. TELEPHONE, GAS, WATER AND ELECTRICITY USERS TAX

17000. *Definitions.* Except where the context otherwise requires, the definitions contained in this Section shall govern the construction of this Article:

(a) "Person" shall mean all natural persons, domestic and foreign corporations, associations, syndicates, joint stock companies, partnerships of every kind, joint ventures, clubs, Massachusetts business or common law trusts and societies.

(b) "Month" shall mean a calendar month.

(c) "Service user" shall mean a person required to pay a tax imposed under the provisions of this Article.

(d) "Service supplier" shall mean any person required to collect a tax imposed under the provisions of this Article.

(e) "Tax Administrator" shall mean the Director of Finance of City.

(f) "City" shall mean the City of San Jose.

(g) "Electrical corporation", "gas corporation", and "telephone corporation" shall have the same meanings as defined in Sections 218, 222 and 234, respectively, of the Public Utilities Code of the State of California.

(h) "Water corporation" shall mean and include every corporation, or person including City, owning, controlling, operating or managing any water system for compensation within the State of California.

17001. *City, Public Entity and Constitutional Exemptions.* Nothing in this Article shall be construed as imposing a tax upon (1) the City, or (2) any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of the State of California, or (3) the State, any county, municipal corporation, city and county, district or any political subdivision of the State of California.

17002. *Telephone Users Tax and Operative Dates.*

(a) There is hereby imposed a tax, at the herein specified rates, upon every person in the City, other than a telephone corporation, using intrastate telephone communication services in the City:

(1) A tax at the rate of seven and one-half percent (7½%) of the charges made for such services, including minimum charges for service, is hereby imposed upon such persons and shall be operative during the period commencing September 1, 1970, or at the beginning of the first regular billing period for each such person on or after September 1, 1970, whichever is later; and ending at the end of the last regular billing period for each such person which commences on or before April 30, 1971. Said tax shall be paid by the person paying for such service.

(2) A tax at the rate of five percent (5%) of the charges made for such services, including minimum charges for service, is hereby imposed upon such persons and shall be operative from and after May 1, 1971, or at the beginning of the first regular billing period for each such person on or after May 1, 1971, whichever is later. Said tax shall be paid by the person paying for such service.

(b) As used in this Section, the term "charges" shall not include charges for services paid for by inserting coins in coin-operated telephones except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due; nor shall the words "telephone communication service" include land mobile services or maritime mobile service as defined

in Section 2.1 of Title 47 of the Code of Federal Regulations, as said Section existed on January 1, 1970.

(c) The tax imposed in this Section shall be collected from the service user by the person providing the intrastate telephone communication services. The amount of tax collected in one calendar month shall be remitted to the Director of Finance of City on or before the last calendar day of the following calendar month except that the taxes collected in May of any year shall be remitted on or before June 25th.

(d) Notwithstanding the provisions of subsection (a), the tax imposed under this Section shall not be imposed upon any person for using intrastate telephone communication services to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under Section 4251 of Title 26 of the United States Code, as said Section existed on January 1, 1970.

17003. *Electricity Users Tax and Operative Dates.*

(a) There is hereby imposed a tax, at the herein specified rates, upon every person in the City other than an electrical corporation or a gas corporation, using electrical energy in the City:

(1) A tax rate of seven and one-half percent (7½%) of the charges made for such energy, including minimum charges for service, is hereby imposed upon such persons and shall be operative during the period commencing September 1, 1970, or at the beginning of the first regular billing period for each such person on or after September 1, 1970, whichever is later, and ending

at the end of the last regular billing period for each such person which commences on or before April 30, 1971. Said tax shall be paid by the person paying for such energy.

(2) A tax at the rate of five percent (5%) of the charges made for such energy, including minimum charges for service, is hereby imposed upon such persons and shall be operative from and after May 1, 1971, or at the beginning of the first regular billing period for each such person on or after May 1, 1971, whichever is later. Said tax shall be paid by the person paying for such energy.

(b) As used in this Section, the words "using electrical energy" shall not be construed to mean the storage of such energy by a person in a battery owned or possessed by him for use in an automobile or other machinery or device apart from the premises upon which the energy was received; provided, however, that the term shall include the receiving of such energy for the purpose of using it in the charging of batteries.

(c) As used in this Section, the words "using electrical energy" shall not be construed to mean the receiving of such energy by an electrical corporation or a governmental agency at a point within the City for resale, or electrical energy used by a water corporation to pump water.

(d) The tax imposed in this Section shall be collected from the service user by the person selling such electrical energy. The amount of tax collected

in one calendar month shall be remitted to the Director of Finance of City on or before the last calendar day of the following calendar month, except that the taxes collected in May of any year shall be remitted on or before June 25th.

17004. *Gas Users Tax and Operative Dates.*

(a) There is hereby imposed a tax, at the herein specified rates, upon every person in the City, other than a gas corporation or an electrical corporation, using gas in the City which is delivered through mains or pipes by a gas corporation:

(1) A tax at the rate of seven and one-half percent (7½%) of the charges made for such gas, including minimum charges for service, is hereby imposed upon such persons and shall be operative during the period commencing September 1, 1970, or at the beginning of the first regular billing period for each such person on or after September 1, 1970, whichever is later, and ending at the end of the last regular billing period for each such person which commences on or before April 30, 1971. Said tax shall be paid by the person paying for such gas.

(2) A tax at the rate of five percent (5%) of the charges made for such gas, including minimum charges for service, is hereby imposed upon such persons and shall be operative from and after May 1, 1971, or at the beginning of the first regular billing period for each such person on or after May 1, 1971, whichever is later. Said tax shall be paid by the person paying for such gas.

(b) As used in this Section, the word "charges" shall not include charges made for gas used in the generation of electrical energy by a public utility or a governmental agency.

(c) As used in this Section, the words "using gas" shall not be construed to mean the receiving of such gas by a gas corporation or governmental agency at a point within the City for resale and delivery through pipes and mains or gas used by a water corporation to pump water.

(d) The tax imposed in this Section shall be collected from the service user by the person selling the gas. The amount collected in one calendar month shall be remitted to the Director of Finance of City on or before the last calendar day of the following calendar month, except that the taxes collected in May of any year shall be remitted on or before June 25th.

17005. *Water Users Tax and Operative Dates.*

(a) There is hereby imposed a tax, at the herein specified rates, upon every person in the City other than a water corporation, using water in the City which is delivered through mains or pipes:

(1) A tax at the rate of seven and one-half percent (7½%) of the charges made for such water, including minimum charges for service, is hereby imposed upon such persons and shall be operative during the period commencing September 1, 1970, or at the beginning of the first regular billing period for each such person on or after September 1, 1970, whichever is later, and

ending at the end of the last regular billing period for each such person which commences on or before April 30, 1971. Said tax shall be paid by the person paying for such water.

(2) A tax at the rate of five percent (5%) of the charges made for such water, including minimum charges for service, is hereby imposed upon such persons and shall be operative from and after May 1, 1971, or at the beginning of the first regular billing period for each such person on or after May 1, 1971, whichever is later. Said tax shall be paid by the person paying for such water.

(b) The tax imposed in this Section shall be collected from the service user by the person selling the water. The amount collected in one calendar month shall be remitted to the Director of Finance of City before the last calendar day of the following calendar month, except that the taxes collected in May of any year shall be remitted on on before June 25th.

17006. *Actions to Collect.* Any tax required to be paid by a service user under the provisions of this Article shall be deemed a debt owed by the service user to the City. Any such tax collected from a service user which has not been remitted to the Director of Finance of City shall be deemed a debt owed to the City by the person required to collect and remit. Any person owing money to the City under the provisions of this Article shall be liable to an action brought in the name of the City for the recovery of such amount.

17007. *Duty to Collect—Procedures.* The duty to collect and remit the taxes imposed by this Article shall be performed as follows:

(a) The tax shall be collected, insofar as practicable, at the same time as and along with the charges made in accordance with regular billing practice of the service supplier. Except in those cases where a service user pays the full amount of said charges but does not pay any portion of a tax imposed by this Article, or where a service user has notified a service supplier that he is refusing to pay a tax imposed by this Article which said service supplier is required to collect, if the amount paid by a service user is less than the full amount of the charge and tax which has accrued for the billing period, a proportionate share of both the charge and the tax shall be deemed to have been paid.

(b)(1) The duty to collect the seven and one-half percent (7½%) tax imposed by Sections 17002(a)(1), 17003(a)(1), 17004(a)(1) and 17005(a)(1) from a service user shall commence with the beginning of the first regular billing period applicable to that person which starts on or after September 1, 1970; provided that water corporations may, at their option, defer collection of said tax for water use to the second regular billing period on or after September 1, 1970 by including the tax for the first regular billing period starting on or after September 1, 1970, together with the tax for the second regular billing period, in the billing

for said second regular billing period. Nothing contained in the above proviso is intended to, nor shall be deemed to, defer the date of imposition of said tax or its operative date or to relieve any user from his obligation to pay said tax for the period beginning with the date such tax is imposed and becomes operative.

(2) The duty to collect the five percent (5%) tax imposed by Sections 17002(a)(2), 17003(a)(2), 17004(a)(2) and 17005(a)(2) from a service user shall commence with the beginning of the first regular billing period applicable to that person which starts on or after May 1, 1971.

(c) Where a person receive more than one billing, one or more being for different periods than another, the duty to collect shall arise separately for each billing period.

17008. *Administrative Agreements.* The Director of Finance of City may make administrative agreements with service suppliers to vary the strict requirements of this Article so that collection of any tax imposed herein may be made in conformance with the billing procedures of a particular service supplier so long as the overall result of said agreements results in collection of the tax in conformance with the general purpose and scope of this Article. The Director of Finance may terminate any such agreement at any time in his sole discretion. A copy of each such agreement shall be on file and available for public examination in the office of the Director of Finance of City.

17009. *Interest and Penalty.*

(a) Taxes collected from a service user which are not remitted to the Director of Finance of City on or before the due dates provided in this Article are delinquent.

(b) Interest and penalties for delinquency in remittance of any tax collected and not remitted shall be assessed as follows:

(1) Any service supplier who fails to remit any tax imposed by this Article within ten (10) days after receipt of written notice from the City of such failure shall pay a penalty of ten percent (10% of the amount of the tax.

(2) If the Director of Finance of City determines that the non-payment of any remittance due under this Article is due to fraud, a penalty of twenty-five percent (25%) of the amount of the tax shall be added thereto in addition to the penalty stated in subparagraph (1) of this subsection (b).

(3) In addition to the penalties imposed in this subsection (b), any service supplier who fails to remit any tax imposed by this Article, shall pay interest at the rate of one-half of one percent (½%) per month or fraction thereof, on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.

(4) Every penalty imposed upon a service supplier, and such interest as accrues, under the

provisions of this subsection (b) shall become a part of the tax required to be remitted.

(c) Failure by a service user to pay any tax herein imposed shall result in the following interest and penalties on the service user:

(1) Any service user who fails to pay any tax imposed by this Article within one hundred and twenty (120) days of the date of the receipt of notice of the amount of tax due from the service supplier shall pay a penalty of ten percent (10%) of the amount of the tax.

(2) Any service user who fails to pay any delinquent remittance on or before a period of one hundred and eighty (180) days of the date of the receipt of notice of the amount of tax due from the service supplier shall pay a second delinquency penalty of ten percent (10%) of the amount of the tax in addition to the amount of the tax and the ten percent (10%) penalty first imposed.

(3) In addition to the penalties imposed in this subsection (c), any service user who fails to pay any tax imposed by this Article, shall pay interest at the rate of six percent (6%) per annum, exclusive of penalties, from the date on which the remittance first became delinquent until paid, and a collection charge of ten dollars ($10) for each delinquent account.

(4) Every penalty imposed upon a service user, and such interest as accrues, under the pro-

visions of this subsection (c) shall become a part of the tax required to be paid.

(5) The penalties, interest and collection charges imposed in this subsection (c) shall not be collected by the service supplier, but shall be determined and collected by the City as set forth in Section 17011.

17010. *Refusal to Collect and Report Tax—Determination of Tax by Tax Administrator.* If any service supplier shall refuse to make within the time provided in this Article, any report and remittance of said tax or any portion thereof required by this Article, the Director of Finance of City shall proceed in such manner as he may deem best to obtain facts and information on which to base his estimate of the tax due. As soon as the Director of Finance of City shall procure such facts and information as he is able to obtain upon which to base the assessment of any tax imposed by this Article and payable by any service supplier who has refused to make such report and remittance, he shall proceed to determine and assess against such service supplier the tax, interest and penalties provided for by this Article. In case such determination is made, the Director of Finance of City shall give a notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the service supplier so assessed at his last known place of address. Such service supplier may within ten (10) days after the serving or mailing of such notice, make application in writing to the Director of Finance of

City for a hearing on the amount assessed. If application by the service supplier for a hearing is not made within the time prescribed, the tax, interest and penalties, if any, determined by the Director of Finance of City shall become final and conclusive and immediately due and payable. If such application is made, the Director of Finance of City shall give not less than five (5) days written notice in the manner prescribed herein to the service supplier to show cause at a time and place fixed in said notice why said amount specified therein should not be fixed for such tax, interest and penalties. At such hearing, the service supplier may appear and offer evidence why such specified tax, interest and penalties should not be so fixed. After such hearing, the Director Finance of City shall determine the proper tax to be remitted and shall thereafter give written notice to the service supplier in the manner prescribed above of such determination and the amount of such tax, interest and penalties. The amount determined to be due shall be payable after fifteen (15) days unless an appeal is taken as provided in Section 17012.

17011. *Assessment—Administrative Remedy.* Whenever the Director of Finance of City determines that a service user has deliberately withheld the amount of any tax imposed on him by the provisions of this Article from the amounts remitted to a service supplier required to collect the tax, or whenever the Director of Finance deems it in the best interest of the City, he may, but shall under no circumstances be required to, relieve such service supplier of the obligation to collect taxes due under this Article from

certain named service users for specified billing periods; provided that if a service user has failed to pay the amount of the tax to such service supplier for a period of four consecutive billing periods, the Director of Finance shall relieve such service supplier of the obligation to collect taxes due under this Article from those named service users for specified billing periods. The Director of Finance of City shall notify the service user that he has assumed responsibility to collect the taxes due for the stated periods and demand payment of such taxes, plus any penalty imposed and such interest as may be due pursuant to the provisions of Section 17009 of this Article. The notice shall be served on the service user by handing it to him personally or by deposit of the notice in the United Sstates mail, postage prepaid thereon, addressed to the service user at the address to which billing was made by the service supplier required to collect the tax; or, should the service user have changed his address, to his last known address.

17012. *Appeal.* Any person aggrieved by any decision of the Director of Finance of City pursuant to Section 17010 or Section 17011 may appeal to the City Council by filing a notice of appeal with the City Clerk and the Director of Finance of City within fifteen (15) days of the serving or mailing of the decision. The Council shall fix a time and place for hearing such appeal, and the City Clerk shall give notice in writing to such person at his last known place of address. Any amount found to be due shall be immediately due and payable upon the service of said notice.

17013. *Records.* It shall be the duty of every service supplier required to collect and remit to the City any tax imposed by this Article to keep and preserve, for a period of three (3) years, all records as may be necessary to determine the amount of such tax as such service supplier may have been required to collect and remit to the City, which records the Director of Finance of City shall have the right to inspect at all reasonable times.

17014. *Refunds.*

(a) *Filing Claim.* Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City under this Article, it may be refunded as provided in subsections (b) and (c) of this Section, provided a claim in writing therefore, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the Director of Finance of City within three (3) years of the date of payment. The claim shall be on forms furnished by the Director of Finance of City.

(b) *Refund to Service Supplier.* A service supplier may claim a refund or take as credit against taxes collected and remitted an amount overpaid, paid more than once, or erroneously or illegally collected or received, when it is established that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or credited to charges subsequently payable to

the service user, to the service supplier required to collect and remit said tax.

(c) *Refund to Service User.* Any service user may obtain a refund of taxes overpaid, or paid more than once, or erroneously or illegally collected or received by the City, by filing a claim in the manner provided in subsection (a) of this Section, but only when the service user having paid the tax to the service supplier establishes to the satisfaction of the Director of Finance of City that the service user has been unable to obtain a refund from the service supplier who collected the tax.

(d) *Proof Required.* No refund shall be paid under the provisions of this Section unless the claimant establishes his right thereto by written records showing entitlement thereto.

17015. *California Public Utilities Commission Jurisdiction.* Nothing contained in this ordinance is intended to conflict with applicable rules, regulations and tariffs of any service supplier subject to the jurisdiction of the California Public Utilities Commission. In the event of any conflict, the provisions of said rules, regulations and tariffs shall control.

17016. *Payment by City for Conversion Expenses.*

(a) Each service supplier shall be entitled subject to the following provision, to obtain reimbursement from City for the reasonable and necessary costs and expenses incurred by each such service supplier in making conversions to its billing and accounting procedures necessitated by the change in the tax rate occurring from and after May 1, 1971.

(b) Any service supplier who has incurred such costs and expenses may claim reimbursement therefor by filing, no later than June 30, 1971, a written claim with the Tax Administrator, in form satisfactory to the Tax Administrator, setting forth the nature of the conversions necessitated by such change in the tax rate, and a detailed statement of the costs and expenditures incurred in connection therewith. The Tax Administrator may require any service supplier to provide additional information with respect thereto.

The Tax Administrator may approve said claim, or he may approve said claim in part, or reject said claim if he finds that all or parts thereof are invalid.

If the Tax Administrator determines that all or part of such claim is valid, he shall notify the qualifying service supplier of his determination and shall direct said service supplier to retain from its next succeeding tax remittance the portion of the claim so approved.

17017. *Purpose.* The taxes imposed and levied by the provisions of this Article are solely for the purpose of providing revenue for the usual current expenses of the City. The provisions of this Article are not enacted for regulatory purposes.

17018. *Severability.* If any section, subsection, sentence, clause, phrase or portion of this Article is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this Article. The Council of the City of San Jose hereby declares that it would have

adopted this Article and each section, subsection, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

Passed for publication this 6th day of July, 1970 by the following vote:

Ayes: Councilmen—Goglio, Gross, Mineta, James.

Noes: Councilmen—Colla, Shaffer.

Absent: Councilmen—Hays.

/s/ Ronald R. James
Mayor
Ronald R. James

Attest:

/s/ Francis L. Greiner
City Clerk
Francis L. Greiner

Void if detached

The attached is a full, true and correct copy of Ordinance No. 15285 which became effective on August 13, 1970.

Attest:

(Seal) Francis L. Greiner,
City Clerk of the City of
San Jose, Calif.

By: Beatrice Sichemon, Deputy

Dated: March 14, 1972

ORDINANCE NO. 15639

ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTIONS 17009 AND 17011 OF ARTICLE XVII OF THE SAN JOSE MUNICIPAL CODE TO PROVIDE THAT PENALTIES FOR NON-PAYMENT OF TELEPHONE, GAS, WATER AND ELECTRICITY USERS TAX SHALL NOT BE IMPOSED UPON A SERVICE USER IF PAYMENT OF SUCH TAX IS MADE WITHIN 15 DAYS AFTER NOTICE IS GIVEN TO THE SERVICE USER BY THE DIRECTOR OF FINANCE, AND PROVIDING FOR A PENALTY FOR FAILURE TO PAY WITHIN SUCH TIME IN THE AMOUNT OF 10% OF THE TAX BUT NOT LESS THAN $10; SUCH PROVISION TO BE APPLICABLE TO ALL TAXES NOT PAID BY A SERVICE USER FROM AND AFTER THE OPERATIVE DATE OF SUCH TAXES.

Be It Ordained by the Council of the City of San Jose:

SECTION 1. Section 17009 of Article XVII of the San Jose Municipal Code is hereby amended to read as follows:

17009. *Interest and Penalty.*

(a) Taxes collected from a service user which are not remitted to the Director of Finance of City on or before the due dates provided in this Article are delinquent.

(b) Interest and penalties for delinquency in remittance of any tax collected and not remitted shall be assessed as follows:

(1) Any service supplier who fails to remit any tax imposed by this Article within ten (10) days after receipt of written notice from the

City of such failure shall pay a penalty of ten percent (10%) of the amount of the tax.

(2) If the Director of Finance of City determines that the non-payment of any remittance due under this Article is due to fraud, a penalty of twenty-five percent (25%) of the amount of the tax shall be added thereto in addition to the penalty stated in subparagraph (1) of this subsection (b).

(3) In addition to the penalties imposed in this subsection (b), any service supplier who fails to remit any tax imposed by this Article, shall pay interest at the rate of one-half of one percent (½%) per month, or fraction thereof, on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.

(4) Every penalty imposed upon a service supplier, and such interest as accrues, under the provisions of this subsection (b) shall become a part of the tax required to be remitted.

SECTION 2. Section 17011 of Article XVII of the San Jose Municipal Code is hereby amended to read as follows:

17011. *Assessment—Administrative Remedy.* Whenever the Director of Finance of City determines that service user has deliberately withheld the amount of any tax imposed on him by the provisions of this Article from the amounts remitted to a service supplier required to collect the

tax, or whenever the Director of Finance deems it in the best interest of the City, he may, but shall under no circumstances be required to relieve such service supplier of the obligation to collect taxes due under this Article from certain named service users for specified billing periods; provided that if a service user has failed to pay the amount of the tax to such service supplier for a period of four consecutive billing periods, the Director of Finance shall relieve such service supplier of the obligation to collect taxes due under this Article from those named service users for specified billing periods.

The Director of Finance shall notify the service user that he has assumed responsibility to collect the taxes due for the stated periods and demand payment of such taxes. The notice shall be served on the service user by handing it to him personally or by deposit of the notice in the United States mail, postage prepaid thereon, addressed to the service user at the address to which billing was made by the service supplier; or, should the service user have changed his address, to his last known address. If a service user fails to remit the tax to the Finance Director of City within fifteen (15) days from the date of the service of the notice upon him, which shall be the date of mailing if service is not accomplished in person, a penalty of ten percent (10%) of the amount of the tax set forth in the notice shall be imposed, but not less than $10, and shall become part of the tax herein required to be paid.

The provisions of this section shall be applicable to all taxes not paid by a service user from and after the operative dates of the taxes as prescribed in this Article.

Passed for publication this 12th day of April, 1971 by the following vote:

Ayes: Councilmen—Colla, Goglia, Gross, Hays, Shaffer and James.

Noes: Councilmen—None

Absent: Councilmen—Mineta

Ronald R. James
/s/ Ronald R. James
Mayor

Attest: Frances L. Greiner
/s/ Roy H. Hubbard
City Clerk

By: Roy H. Hubbard, Deputy

Void if detached

The attached is a full, true and correct copy of Ordinance No. 15639 which became effective on May 26, 1971

Attest:

(Seal) Francis L. Greiner,
City Clerk of the City of
San Jose, Calif.
By: Beatrice Sichemon, Deputy
Dated: Sept. 20, 1972

Appendix II

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Civ. No. 35330
(Sup.Ct. No. 277500)

City of San Jose, a municipal corporation,
Plaintiff and Respondent,
vs.
Joseph H. Donohue,
Defendant and Appellant.

[Dated Aug. 28, 1975]

OPINION

Plaintiff City of San Jose brought an action in small claims court against defendant Joseph Donohue, seeking to recover the sum of $90.85 which was allegedly due under a city ordinance imposing a tax upon utility users. Defendant challenged the constitutionality of the ordinance, and the case was transferred to the superior court. (Code Civ. Proc., §§ 89, subd. (a)

(1); 117.) The superior court upheld the validity of the ordinance and entered judgment for plaintiff city in the amount of $90.85, plus interest and costs. Defendant Donohue has appealed from that judgment.

The San Jose ordinance here under review (Ordinance No. 15285, as amended by Ordinance No. 15639) provides that every person[1] within the city shall pay a tax in the amount of five percent of the charges made for such person's use of telephones, gas, water and electricity. The ordinance provides that the tax shall be collected by the utilities, along with their regular monthly bills, and forwarded to the city. If a utility user refuses to pay the tax for four consecutive months, he receives a 15-day demand notice from the city. Upon his failure to remit the tax due within the required 15-day period, he then becomes subject to a penalty equal to 10 percent of the tax due or $10, whichever amount is greater.

The ordinance contains a provision[2] which exempts from the application of the utility tax "(1) the City, or (2) any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of the State of California, or (3) the State, any county, municipal corporation, city and county, district or any political subdivision of the State of California."

[1]The term "person" is defined in section 17000 of the ordinance to include "natural persons, domestic and foreign corporations, associations, syndicates, joint stock companies, partnerships of every kind, joint ventures, clubs, Massachusetts business or common law trusts and societies."

[2]Section 17001.

At the trial in the superior court, defendant attacked the utility tax ordinance upon two grounds: (1) the ordinance, as written and applied, violated the equal protection and due process clauses of the United States Constitution because certain utility users were either exempt from taxation or paid a lesser amount of taxes than others; and (2) the penalty provision of the ordinance violated the due process clause of the United States Constitution because the amount of the penalty was arbitrary and excessive and bore no reasonable relationship to the amount of the tax owed by a particular utility user.

Defendant demonstrated at the trial that, in accordance with the exemption provision of the ordinance, no utility tax was assessed against any public entity. Likewise, the tax was not assessed against insurance companies or banks, which are exempt from such taxation under article XIII, sections 14 4/5 and 16,[3] of the Constitution of the State of California. Defendant also established that some individuals who leased premises from a public entity, insurance company or bank were not taxed on utility service furnished to the leased premises. In addition, it was shown that employees of public utilities received utility service at a reduced rate or, in some instances, free of charge, and that the utility tax was assessed only against the actual amounts billed to these individuals.

At the conclusion of the trial, the court rendered findings of fact and conclusions of law wherein it de-

[3]Section 16 was repealed November 5, 1974, and replaced by section 27.

termined that the utility tax ordinance was constitutional and valid. A money judgment for the amount of the tax and penalty found to be due was entered in favor of plaintiff city. Defendant Donohue filed notice of appeal from that judgment.

On appeal, defendant takes the position that the constitutional arguments raised in the trial court were all sound and that the court erred in upholding the validity of the utility tax ordinance. We do not agree.

Defendant's first ground of attack upon the ordinance, as noted above, is that it is not applied equally to all utility users, and hence violates the equal protection and due process clauses of the federal constitution.

The merits of this contention must be weighed in the light of certain well-established principles: Absolute uniformity or equality in the application of tax measures can never be obtained. (*Willingham Bus Lines, Inc. v. Municipal Court* (1967) 66 Cal.2d 893, 897-898; *Los Angeles etc. Corp. v. Los Angeles* (1912) 163 Cal. 621, 626-627.) A tax statute or ordinance which distinguishes between parties does not violate the equal protection or due process clause if the distinction rests upon a rational basis, and it must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (*Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38.) A legislature is not bound to tax every member of a particular class or none (*Stevens v. Watson* (1971) 16 Cal.App.3d 629, 633), and it is constitutionally permissible to subdivide the class on the basis

of the tax collectibility problem. (*Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 1019.) Administrative convenience and expense in the collection or measurement of a tax are alone a sufficient justification for treating some taxpayers differently than others. (*Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 511.)

The question before us, therefore, is whether there is a rational basis for the nonapplicability of the utility tax in those instances of which defendant complains. We have no difficulty in concluding that there is.

We consider first the fact that the utility tax is not assessed against the city itself nor against any other public entity. The exemption of other public entities from payment of the tax is clearly reasonable. In *Carmichael v. Southern Coal Co., supra,* at p. 513, where the validity of a state tax upon employers was at issue, the court pointed out that "The state may reasonably waive the formality of taxing itself or its political subdivisions. Fear of constitutional restrictions, and a wholesome respect for the proper policy of another sovereign, would explain exemption of the United States, and of the interstate railways . . . ." In this case, the trial court made the following findings concerning the exemption in favor of public entities: "Federal Government agencies paid no utility taxes as Federal law preempts such taxation. . . . Exemption for City property is a reasonable classification as it is merely transferring payments from one pocket of the City to another. . . .

Counties and other public agencies were exempt from utility taxation and said exemption is a reasonable classification as such agencies are public-supported and would merely add to the tax burden of the same taxpayers as pay the utility tax." In all respects the trial court's reasoning is sound.

Insofar as defendant questions the existence of a rational basis for exempting insurance companies and banks from the application of the utility tax ordinance, it suffices to point out that article XIII, section 14 4/5 and former section 16, of the California Constitution, expressly prohibit the imposition of any such tax upon insurance companies and banks. A constitutional mandate provides a rational basis for tax exemption.

Defendant's final ground for claiming a lack of uniformity and equality in the application of the utility tax ordinance is based upon the fact that employees of utility companies, who receive utility service at a reduced rate or free of charge, pay a utility tax only on the amount billed to them by the utility companies and that certain persons who lease premises from public entities, insurance companies or banks pay no utility tax. These exemptions find their rational basis in the administrative convenience and expense involved in collecting and measuring the tax.

In *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 508, the appellate court upheld the right of the city to compel the suppliers of utility service to collect the city's utility tax from utility users: The court stated: "The power of a city

operating under a home rule charter to levy a utility users' tax is a municipal affair and stems from the Constitution. (Cal. Const., art XI, § 5; *Rivera v. City of Fresno, supra,* 6 Cal.3d 132, 135; *West Coast Adver. Co. v. San Francisco,* 14 Cal.2d 516, 521-522 [95 P.2d 138].) But, it is obvious that such city has no practical nor economical means of collecting such a tax without the cooperation of the supplier of the utility service. For example, to collect a mere 5 percent of the monthly or bi-monthly charges made by appellant districts for electrical energy supplied to city users, the city would have to audit the books and records of each district on a monthly or bi-monthly basis in order to ascertain the exact charges made by the districts, and then the city would have to bill separately each user *or* the city would have to duplicate the meter reading and billing procedures of the districts *or* the city would have to canvass each user to find the amount charged. It seems clear to us that the cost of collection could, in many cases, exceed the tax bill and that a substantial part, if not all, of the city's tax revenue from the use of electrical energy by city consumers sold by the districts would be lost in the collection process.

"It is basic that the power to tax carries with it the corollary power to use reasonable means to effect its collection: otherwise, the power to impose a tax is meaningless. (*Ainsworth v. Bryant,* 34 Cal.2d 465, 476 [211 P.2d 564].)"

In this instance, the utility tax ordinance quite reasonably provides that the tax shall be collected by

the utility companies, along with their regular monthly bills, and forwarded to the city. The Director of Finance for plaintiff City of San Jose testified that there are some 130,000 to 150,000 customers for each of the three major utilities, Pacific Gas and Electric Company, the San Jose Water Works and Pacific Telephone. Based upon a study made through a small water company owned by the city, it was determined that it would cost the city $6 per customer per year if the city were to attempt to send out its own bills for the utility tax. It is apparent that in many instances the cost of billing would exceed the amount of the 5 percent utility tax; thus, the only economically feasible solution consists of that which was adopted by the city, viz., the billing of the tax by the utility companies.

Since, as a matter of necessity, the city must utilize the existing billing systems of the utility companies, the city may not be charged with inequality in the administration of the tax merely because the utility companies furnish their employees with utility service at reduced rates or free of charge and reflect those benefits in their billings. Further, the evidence establishes that the number of utility company employees receiving such benefits constitutes an extremely small percentage of the total number of utility users whom the city is able to tax by utilizing the billing systems of the utility companies. For example, the evidence showed that the San Jose Water Works furnished free water service to a total of 99 persons, whereas there were between 130,000 and 150,-

000 customers of the water works. Plaintiff city correctly points out that, assuming a monthly water bill of $10 per month, the 99 persons receiving free water service would, if subject to the utility tax, pay the city a total yearly sum of $6 apiece. The law disregards trifles. (Civ. Code, §3533.)

The fact that some lesses of public entities, insurance companies and banks pay no utility tax, again results from administrative necessity. Thus, defendant established only that if a public entity, insurance company or bank owned and occupied a building and leased portions of said building to other persons and the building contained but one meter to measure the use of a particular utility, no utility tax was charged. There was testimony by a representative of the San Jose Water Works that the utility company was furnished by the city with a list of the utility users (public entities, insurance companies and banks) which were exempt from the utility tax. Where such exempt user was the owner and occupier of a building which contained other tenants as well, but only one water meter, there was no way for the water company to determine what portion of the water used was exempt from the utility tax and what portion was not. It was impossible, therefore, to assess a utility tax in such a situation. The evidence showed that representatives of the city had discussed this problem with the utility companies and had learned that single meters for buildings occupied by several tenants were permissible under the rules and regulations of the Public Utilities Commission and that the city could

not require the utility companies to install separate meters in such buildings.

Here again, we are confronted with a situation where perfect equality of taxation is not possible of attainment. Clearly, there is a rational basis for the city's failure to tax tenants of buildings whose owners are exempt from the application of the utility tax. Thus, it follows that there is no merit to defendant's claim that the tax is applied in such a manner as to deprive him of equal protection or due process of law.

Finally, we consider defendant's contention that the penalty provision of the utility tax ordinance is arbitrary and excessive and hence unconstitutional. The gist of this argument is that the ordinance calls for a penalty of 10 percent of $10, whichever sum is greater, and can thus cause a situation where nonpayment of a tax in the amount of only a few cents results in the imposition of a $10 penalty.

In the early case of *Western Union Telegraph Co. v. Indiana* (1897) 165 U.S. 304, the United States Supreme Court upheld a state tax statute providing for the assessment of a penalty equal to 50 percent of the amount of the unpaid tax assessed. The court rejected the argument that the penalty was arbitrary in amount and hence violative of the equal protection and due process clauses and held that the amount of the penalty was a matter for the state legislature to determine.

In *Jackson v. City of Glenwood Springs* (1950) 221 P.2d 1083, the Colorado Supreme Court upheld the

constitutionality of a municipal ordinance imposing a $100 penalty for the failure to file an occupational tax return. The court stated, "We cannot adopt the contention of the plaintiffs, that the fines here imposed are clearly excessive. We believe the amount of the fines provided in this ordinance are within the area of legislative discretion." (P. 1085.)

Here, plaintiff city correctly points out that the evident purpose of the penalty is to induce prompt payment of the utility tax and that a penalty must be sufficiently substantial in amount if this result is to be achieved. Plaintiff also points out that the uncontradicted evidence established that the cost to the city of collecting a delinquent utility tax was $10.20, an amount in excess of the penalty. We conclude that the penalty is neither arbitrary nor excessive in amount.

The judgment is affirmed.

Certified for Publication.

Rouse, J.

We concur:

Taylor, P. J.

Kane, J.

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

No. 35,330

City of San Jose,
Plaintiff and Respondent,
vs.
Joseph H. Donohue,
Defendant and Appellant.

[Filed Sep. 26, 1975]

BY THE COURT:

The petition for a rehearing filed in the above entitled cause is hereby denied.

Dated Sep. 26, 1975

Taylor, P.J.

Appendix III

Order Due
October 27, 1975

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 2, Civil No. 35,330

In the Supreme Court of the State of California
In Bank

City of San Jose, etc.

v.

Donohue

[Filed Oct. 23, 1975]

Appellant's petition for hearing DENIED.

/s/ Wright,
Chief Justice

DEC 20 1975

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-761

JOSEPH H. DONOHUE, *Appellant,*

vs.

CITY OF SAN JOSE, a Municipal Corporation, *Appellee.*

On Appeal from the Court of Appeal of the State of California First Appellate District, Division Two

MOTION TO DISMISS APPEAL OR AFFIRM

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-761

JOSEPH H. DONOHUE, *Appellant,*

vs.

CITY OF SAN JOSE, a Municipal Corporation, *Appellee.*

On Appeal from the Court of Appeal of the State of California First Appellate District, Division Two

MOTION TO DISMISS APPEAL OR AFFIRM

Appellee, City of San Jose, moves to dismiss or affirm the above-entitled matter on the grounds that the question presented is so unsubstantial as not to need further argument.

INTRODUCTION

Appellant has not really submitted a jurisdictional statement pursuant to the United States Supreme Court Rules, but has merely retyped his Appellant's Opening Brief in the Court of Appeal of the State

of California and added two paragraphs at the end of the *"Proceedings in the Superior Court"* on pages 4-5 of his Jurisdictional Statement noting the appellate proceedings. Appellee, in its Respondent's Brief in the Court of Appeal answered and refuted the numerous issues brought up by Appellant in that Brief. Rather than repeat those arguments, particularly as to the Findings, Conclusions of Law and Admission of Evidence, in this Motion, Appellee has addressed this Motion basically to the more fundamental question of whether there is really any substantial federal question at stake in this appeal.

QUESTIONS PRESENTED

1. Does the utility tax or ordinance violate the Fourteenth Amendment by levying the tax on the persons who pay utility bills and calculated by the amount of the charges paid, and thus not collecting (a) the full amount of the tax from certain utility employees who pay at reduced rates or get free usage for a certain utility, and not collecting (b) from a lessee from an exempt entity who pays no utility taxes for a particular utility where there is no separate billing from that utility to that lessee?

2. Does the utility tax ordinance violate the Fourteenth Amendment on due process and equal protection by exempting the City, those entities exempt under the California or the United States Constitutions, and certain public entities?

3. Is the $10 monthly minimum penalty for unpaid utility taxes so excessive and arbitrary as to violate the due process and equal protection clause?

STATUTES INVOLVED

Ordinances No. 15285 and No. 15639 are set forth in the Jurisdictional Statement Appendix I.

STATEMENT OF FACTS

The utility tax of the City of San Jose levies a tax (5% during most of the period at issue) on the person paying for the telephone, gas, water and electric usage calculated upon the amount of charges billed by utility service suppliers. The tax is collected by the utility with their regular monthly bills and forwarded to the City. If a utility user refuses to pay the tax for four consecutive months, he receives a 15-day demand notice from the City. If he fails to pay the tax within the 15-day period, he is subject to a penalty of 10% of the tax due or $10.00, whichever is greater.

Exemptions in the utility tax are provided for in Section 17001 of the ordinance as follows:

> "17001. *City, Public Entity and Constitutional Exemptions.* Nothing in this Article shall be construed as imposing a tax upon (1) the City, or (2) any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of

the State of California, or (3) the State, any county, municipal corporation, city and county, district, or any political subdivision of the State of California."

ARGUMENT

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

Appellant's basic contentions are that a tax must have absolute equality and uniformity with no exemptions, and that the Appellee, City of San Jose, has the burden of establishing a compelling interest to justify the law.

Appellant is asking the Court to reverse nearly a century of decisions on the review of state taxes under the equal protection clause which put the burden on the person attacking the tax to demonstrate that there is no conceivable reasonable basis supporting the classifications in the tax.

Basically this case is merely one where the issue is whether a tax levied on persons paying for utility services is reasonable where the classification is not only a reasonable one, but having the utility collect the tax with its regular billings is the only reasonable and practical way to collect the taxes without the unreasonable administrative expense of a separate billing system.

There is really no substantial federal question as the legal issues have long been settled by this Court and the lower Court is clearly correct in determining

that there is a reasonable basis for the classification and exemptions in the utility users tax.

The penalty clause is clearly within the legislative discretion according to long established law as well as being consistent with the actual cost of collection.

II

THE BURDEN IS ON APPELLANT TO SHOW THERE IS NO REASONABLE BASIS FOR THE CLASSIFICATION

Appellant erroneously claims that the City has the burden of establishing a compelling interest that justifies the tax. The Appellant cites two recent California cases, *Curtis v. Board of Supervisor*s (1972) 7 C.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 and *Westbrook v. Mihaly* (1970) 2 C.3d 765, 87 Cal.Rptr. 839, 471 P.2d 487, vacated on other grounds (1971) 403 U.S. 915 [29 L.Ed.2d 692, 91 S.Ct. 2224], for the proposition that the compelling interest test applies to this taxation case. Both *Curtis* (majority protest of property owners to prevent incorporation of new city) and *Westbrook* (60% vote on bonds) were voting rights cases which have been deemed to be a fundamental interest requiring the strict test of equal protection. *McDonald v. Board of Education* (1969) 394 U.S. 802, 807 [22 L.Ed.2d 739, 744, 89 S.Ct. 1404]. *Dunn v. Blumstein* (1972) 405 U.S. 330, 337, [31 L.Ed. 274, 281, 92 S.Ct. 995].

However, it is clear that review of State taxation is subject to a far less stringent standard.

In *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356 [35 L.Ed.2d 351, 93 S.Ct. 100], this Court held that the equal protection clause was not violated by imposing liability for ad valorem personal property taxes on corporations and other like entities but not on individuals. The Court stated at 410 U.S. 359-360 [35 L.Ed.2d 354-355]:

> "The Equal Protection Clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others. The test whether the difference in treatment is an invidious discrimination. *(Harper v. Virginia Board of Elections,* 338 U.S. 663, 666, 16 L.Ed.2d 169, 86 S.Ct. 1079). Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-527, 3 L.Ed.2d 480, 79 S.Ct. 437:
>
> 'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of

> state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.'"

In *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734, a property tax exemption to widows but not widowers was upheld as resting "upon some grounds of difference having a fair and substantial relation to the object of the legislation."

See *Madden v. Kentucky,* 309 U.S. 83 [84 L.Ed. 590, 60 S.Ct. 406] where the State of Kentucky laid an ad valorem tax of 50% per $100 on deposits in banks outside the State and only 10 cents per $1,000 on deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court stating at 309 U.S. 88 [84 L.Ed. 593] "in taxation, even more than in other fields, legislatures possess the greatest freedom of classification." The Court in the *Madden* case added: There is a presumption of constitutionality which "can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes" and "The burden is on the one attacking the legislative arrangement to negative any conceivable basis which might support it." Ibid. The Appellant has not met his burden of proof of showing that there is no reasonable basis to support the tax.

Thus it appears that Appellant's claim that the City of San Jose utility tax offends the equal protection and due process clauses of the United States Constitution have been foreclosed by a consistent line of cases holding that where state taxation is conceived, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Lehnhausen v. Lake Shore Auto Parts* (1974) 410 U.S. 356, 359 [35 L.Ed. 2d 351, 354-55, 93 S.Ct. 1001]. "This principle has weathered nearly a century of Supreme Court adjudication." *Kahn v. Shevin* (1974) 416 U.S. 351, 355, 40 L.Ed.2d 189, 193, 94 S.Ct. 1734.

See also *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. 232, 237, 33 L.Ed. 892, 10 S.Ct. 533, *Madden v. Kentucky,* 309 U.S. 83, 87-88, 84 L.Ed. 590, 60 S.Ct. 406, 125 A.L.R. 1383, *Lawrence v. State Tax Comm'n,* 286 U.S. 276, 76 L.Ed. 1102, 52 S.Ct. 556, 87 A.L.R. 374, *Royster Guano Co. v. Virginia,* 253 U.S. 412, 64 L.Ed. 989, 40 S.Ct. 560. A long line of *California* cases are consistently and completely in line with the Supreme Court decisions on equal protection in the field of state taxation. *Stevens v. Watson* (1971) 16 C.A.3d 629, 633, 94 Cal.Rptr. 190, 192, *Roth Drug, Inc., v. Johnson* (1936) 13 C.A.2d 720, 57 P.2d 1022, *Ladd v. State Board of Equalization* (1973) 31 C.A. 3d 35, 38, 106 Cal.Rptr. 885, 887, *Clark v. City of San Pablo* (1969) 270 C.A.2d 121, 126 [75 Cal.Rptr. 726, 729].

Appellant cites no United States Supreme Court case indicating any really substantial federal question in this matter. Appellant cites *Hillsborough*

Township v. Cromwell (1946) 326 U.S. 620, 90 L.Ed. 358, 66 S. Ct. 445, which was a personal property tax assessment case based upon alleged intentional discrimination directed toward an individual. The *Hillsborough* case is not relevant to power of the State to make reasonable classifications for taxation purposes.

The gist of Appellant's argument is that the City intentionally discriminated against some 149,900 or more utility payers by allowing constitutional exemptions to certain unnamed entities. There is no evidence that the City Council knew that any utilities allowed free or reduced utility usage, or that any exempt property was leased to persons who did not pay certain utility bills. The testimony of Ferdinand Palla, then City Attorney of the City of San Jose, cited by Appellant is not part of the record in this case as it was excluded as inadmissible hearsay. Palla was available at the time of trial but was not called as a witness and his prior testimony at the Small Claims Court was denied admission (pp. 105-106).[1] California Evidence Code § 1291. Actually, the testimony of Palla cannot be construed as indicating any knowledge of any alleged discriminatory treatment and, in fact, Palla categorically denies any interest in that regard.

Essentially Appellant's claim comes down to the proposition that a tax must be absolutely equal to all persons and any deviation therefrom makes a tax unconstitutional. This is not the law under the United

[1]Page references in parentheses are to the Reporter's Transcript of the Superior Court proceedings.

States Supreme Court decisions, the California decisions, and if it were the law, would raise havoc with the intensely practical matter of taxation.

In *Ohio Oil Co. v. Conway,* 281 U.S. 146, 159, 74 L.Ed. 775, 782, 50 S.Ct. 310, Mr. Chief Justice Hughes, speaking for the Court, said:

> "The states, in the exercise of their taxing powers, as with respect to the exercise of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may grant exemptions. The state is not limited to ad valorem taxation. . . . in levying such taxes, the state is not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition, use or value. To hold otherwise, would subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our Government, and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

"[A] distinction in tax statutes between parties does not violate the equal protection clause if such distinction rests upon a rational basis. [The United States Supreme] court has said, 'Neither due process nor equal protection imposes upon a state any rigid rule of the equality of taxation . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational

basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.'" (*Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal.2d 222, 233 [45 Cal.Rptr. 869, 404 P.2d 477, 485], quoting *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 509 [81 L.Ed. 1245, 1253, 57 S.Ct. 868, 109 A.L.R. 1327]; see also *Clark v. City of San Pablo* (1969) 270 C.A.2d 121, 126 [75 Cal.Rptr. 726].)

III

LEVYING OF THE TAX ON THOSE WHO PAY FOR UTILITY SERVICE IS A REASONABLE CLASSIFICATION

The utility tax is payable by the person paying for the utility service and is calculated on the amount paid for such service. Here the legislative classification fixed the point in the economic chain at the point at which payment was made for the utility service. *Ladd v. State Board of Equalization* (1973) 31 C.A. 3d 35, 38, 106 Cal.Rptr. 885, 887. A tax on the amount paid for goods or services is a common basis of taxation, for example, sales taxes, admission taxes, federal communications tax (including local telephone services) (26 USC § 4251). The taxes are billed by the utilities with their computerized billing and a single amount paid over to the City by the supplier.

This is a reasonable classification for this taxation and it is also the only economic way to such a tax could be collected without overwhelming administrative expense. The amounts of the utility tax in many

cases are minimal. For example, the Appellant Donohue had a water bill tax of $0.39 on August 3, 1971 (Plaintiff's Exhibit 3), apparently on a $7.80 water bill. To set up a separate billing system to calculate the amount due, and send out bills to between 390,000 and 450,000 accounts per month would defeat the revenue-raising purpose which is the only object of the utility tax ordinance. The City's Finance Director testified that if the City set up its own billing system, it would cost about $6.00 per year, per customer. There are about 130,000 to 150,000 customers for each of the three major utilities, P.G. & E., San Jose Water Works, and the Pacific Telephone Co. (p. 15, line 6 to p. 16, line 3). Thus the expense could run over $2,000,000 to collect $5,000,000 a year. Under any calculation, the expense in collection if the utilities' existing billing system was not used would be unreasonably excessive. Just the postage in billing 150,000 accounts once a month would cost $180,000 per year.

The amount of San Jose Water Works employees getting free residential water was stated to be 99 (p. 99, lines 3-17). This is out of 130,000-150,000 total water company accounts, residential, industrial and commercial (p. 15, line 17, to p. 16, line 3). Certainly this is in the de minimis range. There is no evidence as to number of P.G. & E. employees who get a 25% reduction, or as to the telephone company employees who receive reduced rates. At a $10 per month water bill, these 99 water company employees would pay about $6.00 per year in utility taxes. There were no meters

on the water company employees, so there would be no way to calculate their water usage (p. 99, lines 18-26). The City has no right to force any utility to charge its employees, the Public Utility Commission having jurisdiction as to rates. See *City of Modesto v. Modesto Irrigation District* (1973) 34 C.A.3d 504, 508, 110 Cal.Rptr. 111, 113, where the Court, in upholding the right of the City of Modesto to have an irrigation district collect the utility users' tax stated:

> ". . . The power of a city operating under a home rule charter to levy a utility users' tax is a municipal affair and stems from the Constitution. (Cal. Const., art. XI §5; *Rivera v. City of Fresno, supra,* 6 Cal.3d 132, 135, 98 Cal.Rptr. 281, 282, 490 P.2d 793, 794; *West Coast Adv. Co. v. San Francisco,* 14 Cal.2d 516, 521-522 [95 P.2d 138, 143].) But, it is obvious that such city has no practical nor economical means of collecting such a tax without the cooperation of the supplier of the utility service. For example, to collect a mere 5 percent of the monthly or bi-monthly charges made by appellant districts for electrical energy supplied to city users, the city would have to audit the books and records to ascertain the exact charges made by the districts, and then the city would have to bill separately each user or the city would have to duplicate the meter reading and billing procedures of the districts or the city would have to canvass each user to find the amount charged. It seems clear to us that the cost of collection could, in many cases, exceed the tax bill and that a substantial part, if not all, of the city's tax revenue from the use

> of electrical energy by city consumers sold by ..e districts would be lost in the collection process. It is basic that the power to tax carries with it the corollary power to use reasonable means to effect its collection; otherwise, the power to impose a tax is meaningless. *(Ainsworth v. Bryant,* 34 Cal.2d 465, 476 [211 P.2d 564, 571].)"

Clearly writing the statute so as to make use of the utilities' existing billing system was a reasonable approach.

A legislative body may take into account consideration that inclusion of certain operations would unduly enhance the administrative problems of collecting the tax. *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 511, 81 L.Ed. 1245, 1254-1255, 57 S.Ct. 868; *Clark v. San Pablo* (1969) 270 C.A.2d 121, 133, 75 Cal.Rptr. 726, 733.

The fact that this tax has been adopted in this fashion by 40 California cities indicates the practicality of this mode of taxation. *Rivera v. City of Fresno* (1971) 6 C.3d 132, 134-135, 98 Cal.Rptr. 281, 282, 490 P.2d 793, 794.

IV

AMIDON v. KANE IS NOT OPPOSITE TO THIS CASE

Appellant cites the case *Tilghman v. Kane* (1971 Pa.) 279 A.2d 53 (actually reported as *Amidon v. Kane).* The *Amidon* case is solely a Pennsylvania court's interpretation of the uniformity clause of the

Pennsylvania Constitution which applies to all species of taxes rather than just to direct property taxes, as is the case in California. *Estate of Simpson* (1954) 43 C.2d 594, 597, 275 P.2d 467, 469. *Amidon* has never been cited outside of Pennsylvania. The Pennsylvania interpretation in *Amidon v. Kane* is not relevant to and wholly at variance with the standard of review of state taxation under the United States Constitution.

V

THE EXEMPTIONS ARE REASONABLE

The exemption for constitutional reasons has been applied to exempt banks and insurance companies from the tax. Article XIII, Section 14 4/5 of the California Constitution provides for a tax on gross premiums of insurance companies in lieu of all other taxation (including municipal taxes) except taxes on real property.

Article XIII, Section 27 (formerly Section 16) of the California Constitution provides for a tax on banks based on net income in lieu of all other taxation (including municipal taxation) except taxes on real property. Both of these constitutional provisions are implemented in the California Revenue and Taxation Code.

These exemptions would apply even if not set forth in the ordinance. They are part of an over-all state tax policy on bank and insurance companies which pre-empts local taxation, except real property tax-

ation. Appellant doesn't even claim those exemptions are unconstitutional under the Federal Constitution. Clearly the State has the right to set up a constitutional scheme of taxation that cannot be frustrated by municipal or other taxation contrary to that scheme.

Exempting the City is reasonable as it would merely be taking money from one pocket to another. Public entities may reasonably be exempted as they are public-supported and would merely add to the tax burden of the same taxpayers who pay the utility tax. *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 513, 81 L.Ed. 1245, 1255, 57 S.Ct. 868.

The fact that in some few cases, a bank or insurance company may pay utility bills for water and are exempt from the tax while tenants may be the actual users does not make an invidious discrimination. The tax is laid upon those who pay the utility bills. To require tenants of large buildings to install water meters to measure small amounts of water in order to collect a tax of $0.25 per month ($5.00 water bill) would be unreasonable and unrealistic. Again, this would be within the jurisdiction of the Public Utilities Commission.

Again, in the context of 130,000 to 150,000 accounts for a utility, the small number of such tenants amounts to a de minimis situation. The law disregards trifles. (California Civil Code § 3533).

The federal government and its instrumentalities are exempt from state and local taxation and this immunity goes back to *McCulloch v. Maryland* (1819)

4 Wheat. 316, 4 L.Ed. 579. See *Smith v. Davis* (1944) 323 U.S. 111, 113, 89 L.Ed. 107, 110.

The immunity of the Red Cross from state taxation as a federal instrumentality is set out in *Department of Employment v. U.S.* (1966) 385 U.S. 355, 17 L.Ed. 2d 414, 87 S.Ct. 464 (State of Colorado unemployment taxes).

See also *Western Lithograph Co. v. State Bd. of Equalization*, 11 C.2d 156, 158-159, 78 P.2d 731, 733, where the Court assumed that the federal instrumentality was not liable for sales taxes if the tax was directly on the federal instrumentality.

In *C. R. Fedrick, Inc. v. State Bd. of Equalization* (1974) 38 C.A.3d 385, 395, 112 Cal.Rptr. 598, 605, the Court states that:

> ". . . We have found no decision of the United States Supreme Court which sanctions a state tax directly on the federal government, its functions or instrumentalities."

As to the exemptions for public entities, this seems clearly within the legislative discretion. A tax upon public entities' use of utilities would be paid by the taxpayers in the City and would serve only to raise tax rates of the other entities. The persons who rent City facilities at the airport have their rental rates determined by competitive factors including utility costs (p. 92, line 19 to p. 93, line 3). Actually, all airport tenants have their own individually billed telephone service. Some airport tenants use lights or air conditioning that are provided to common areas. Only 12 lessees pay no utilities except telephone. The

other 12 lessees have their own meters and pay utility bills except for basically common area services furnished, such as air conditioning (p. 90, line 20 to p. 91, line 2; p. 91, line 25 to p. 92, line 18). At the airport, it is necessary to have common areas such as terminal waiting rooms.

VI

THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SUPPORT THE CONCLUSIONS OF LAW AND JUSTICE

Appellant's claims regarding the insufficiency of the Findings of Fact and Conclusions of Law are totally devoid of merit. Appellant does not claim any violation of federal constitutional rights in that regard. Appellant did not even attempt to meet the burden of setting out the evidence in support of the findings and trying to demonstrate that the findings were not supported by substantial evidence, pursuant to the California rule. *Nichols v. Mitchell* (1948) 32 C.2d 598, 600, 197 P.2d 550, 552; *Ames v. Ames* (1959) 68 C.A.2d 39, 40, 335 P.2d 135, 136.

In fact, the Findings of Fact were supported by substantial evidence and every exemption questioned by Appellant was explained and its exempt nature set forth. The City set forth the evidence for each of said findings cited by Appellant in its Respondent's Brief before the Court of Appeal, at pp. 41-44, which did not deem the issue as raised by Appellant substantial enough to comment on. Appellee City did not set forth herein the evidence thereon as it did

not consider the issue relevant to the question of a substantial federal question.

The rejection of the prior transcript of the Small claims proceeding was proper as there was no showing that the witnesses were not available as required by California Evidence Code §1291, and otherwise it was inadmissible hearsay.

VII

THE PENALTY FOR NON-PAYMENT OF THE TAX IS CONSTITUTIONAL

The minimum penalty of $10 is clearly within the legislative discretion. The minimum penalty for non-payment of the utility tax is clearly constitutional. It is not assessed until the utility user fails to pay for four consecutive months and he receives a 15-day demand notice from the City. The purpose of the penalty is to induce prompt payment of the utility tax and must be substantial enough to induce payment. Uncontradicted evidence established that the average cost to the City of collecting a delinquent utility tax bill was $10.20 not accounting for any legal department costs. (R.T. pp. 18-19).

Appellant has cited no case whatever upholding his position while the law from the early case of *Western Union Telegraph Co. v. State of Indiana* (1396) 165 U.S. 304, 41 L.Ed. 725, 17 S.Ct. 345, to date, clearly deems such penalties to be a matter for legislative discretion. See *Jackson v. Glenwood Springs* (1956) 122 Colo. 323, 221 P.2d 1083.

Appellant quotes Judge Nelson's comment regarding the penalty. These comments were dicta in the Small Claims Court when he transferred the case to Superior Court for lack of jurisdiction and his comments were made without any evidence of the cost of collection or of points and authorities on the issue of the penalty.

VIII

SEVERABILITY OF PENALTY

Even if the penalty were deemed so excessive as to be beyond any legislative discretion, and thus unconstitutional, the entire ordinance should not be held void, but only so much of the penalty provision as the Court deems excessive should be stricken or amended as the ordinance provided in Section 17018 for severability in case any portion of the Article setting out the utility users' tax is declared invalid. (*Ex Parte Christensen* (1890) 85 Cal. 208, 211-212, 24 Pac. 747, 748.)

IX

ABSOLUTE EQUALITY IN TAXATION IS NOT ATTAINABLE

In *L. A. Gas and Electric Corp. v. Los Angeles* (1912) 163 Cal. 621, 626-627, 126 P. 594, 597, the Court stated:

> "Absolute uniformity in the practical application of laws relating to taxation can never be attained, and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation."

In the case of *Willingham Bus Lines, Inc. v. Municipal Court* (1967) 66 C.2d 893, 898, 59 Cal.Rptr. 618, 621, 428 P.2d 602, 605-606, in approving a gross receipts tax on a charter bus line against a claim of lack of equal protection where other vehicles for hire were taxed on various other bases, the Court stated:

> "As our social and economic life grows in complexity, legislation necessarily increases in the differentiation of its techniques and in the specialization of its objections. . . . (citations omitted) . . . Now, more than ever, courts must not burden those who formulate tax policy with Procrustean requirements of absolute equality."

Particularly now when municipal financing problems are so troublesome, as evidenced by New York's recent trip to the brink of financial disaster, it is no time to change the Court's historical restricted review of state taxation.

Constitutionally this case has no particular importance. However, to the City of San Jose it represents some $5,000,000 per year, and 10% of its general fund revenues (p. 14, lines 19-23). To San Jose and at least forty other cities with the utility tax, the loss of revenue entailed by a holding that this tax is unconstitutional would be a financial disaster.

CONCLUSION

It appears that there is no substantial federal question at stake in this matter. The case is governed by a consistent line of decisions on the criteria for review of state taxation that ranges over a century and on an equally settled rule on the role of legislative discretion for penalties for non-payment of taxes.

There appears no conflict in the decisions in the United States Supreme Court or in California on such matters, and that the decision of the California Court of Appeal is clearly correct.

It is submitted that the appeal herein should be dismissed, or in the alternative, the decision of the Court of Appeal of the State of California should be affirmed without further argument.

Dated, San Jose, California,
December 17, 1975.

Respectfully submitted,

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